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International Air Transport Association

Washington Office

April 16, 1996

Montreal / Geneva

DEPT OF TRANSPORTATION
OGC/INTERNATIONAL
96 APR 16 PM 4:29

Mr. Donald H. Horn
Assistant General Counsel
for International Law, C-20
Department of Transportation
400 Seventh Street, S.W.
Washington, D.C. 20590

OST-95-232-26

Re: Airline efforts to reform the passenger protections of the Warsaw Treaty system

Dear Mr. Horn:

Air Carriers met in Montreal on the 3rd of April 1996, in accordance with the terms of the Department's Order 96-3-46, to discuss the completion of their efforts to reform the passenger protections of the Warsaw Treaty system.

The enclosed is the IATA Secretariat's Report on that April 3rd meeting. I would invite your attention to Annex 6 of the Report, the Xgreement on Measures to Implement the IATA Intercarrier Agreement. This agreement is submitted subject to further editorial change and clearance by the meeting participants of the definitive final text, which will be forwarded when available.' As noted in the Report, the carriers have set April 26, 1996 as the target date for filing the IATA agreements for review and approval with the European Commission in Brussels and with the Department of Transportation in Washington.

Please call if you have a question.

Best regards.

Sincerely,

David M. O'Connor

David M. O'Connor
Regional Director, US

Enclosure

1001 Pennsylvania Avenue, N.W. • Suite 285
Washington, D.C. 20004-2505

(202) 624-2977
Fax: (202) 347-2366

cc: Docket OST 95-232
Ms. Nancy McFadden, General Counsel, DOT
Ms. Jennifer Richter, Dept. of State
Mr. Gary Allen, Dept. of Justice
Mr. Lorne Clark, General Counsel, IATA

Interna tional Air Transport Association
IATA Building
2000 Peel Street
Montreal, Quebec
Canada H3A 2R4

Memorandum

by courier

TO: Participants, IATA Legal Advisory Subcommittee on Passenger Liability

COPY: Signatories to the IATA Intercarrier Agreement on Passenger Liability

FROM: Lorne S. Clark

DATE: 9 April 1996

REF: Y/3401-D

SUBJECT: **Report of Meeting of the IATA Legal Advisory Subcommittee on Passenger Liability, Montreal, 3 April 1996**

Enclosed please find the Report of the above meeting, together with Annexes, as approved by the Chairman.

As agreed at the meeting, every effort should be made to secure as many signatures as possible of the IIA, and the Implementing Agreement (IIA2), before the filing with governmental authorities later this month. It should also be noted that the meeting agreed that IIA2 may be signed at whatever level a carrier decides, i.e. not necessarily by the CEO.

Also enclosed for your general information is the Report of the Meeting of the IATA/ICC Working Party on Aviation Liability Dispute Resolution held in Paris 1 March 1996. We will keep you informed of future developments on this issue.

With best wishes

Lorne S. Clark
General Counsel and Corporate Secretary

Attachments

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Report of Meeting of the IATA Legal Advisory Subcommittee on Passenger Liability, Montreal, 3 April 1996

Taking advantage of DOT immunity extension Order 96-3-46 of 2 I March 1996, a Subcommittee meeting was convened in Montreal on 3 April 1996 to review and discuss implementation of the IATA Intercarrier Agreement (IIA), opened for signature in Kuala Lumpur 3 1 October 1995.

As required by the Immunity Order, representatives of the US government were invited, but were unable to participate. In addition to the appointed Subcommittee members, representatives of all airlines signatory to the IIA, Regional Airline Associations and the European Commission were invited to the meeting.

The Subcommittee session was chaired by Mr Cameron DesBois (Air Canada) and attended by representatives of 19 airlines, 6 Regional Airline Associations and the European Commission (DG VII). The list of participants is set out in **Annex 1,** the Agenda in **Annex 2** and the list of documents provided for the meeting in **Annex 3.**

The Subcommittee discussion focussed mainly on the following:

- the letter of 13 March from DOT and the 14 March meeting with DOT officials in Washington
- a presentation by ATA providing a detailed review of the US carrier position on the so-called "fifth jurisdiction", attached **as Annex 4**
- the views of other Regional Airline Associations
- possible means of implementing the IIA
- finalisation of the implementation agreement (IIA2) drafted in Miami 1 February 1996
- timeframe for filing reports with governments

After considerable discussion concerning the so-called "fifth jurisdiction" (which would allow an action for damages in the territory of the passenger's domicile or permanent residence if the carrier maintains a place of business therein), the Subcommittee noted that the IIA implementation agreement that IATA is filing with governments would not include a reference to any proposal which would affect the scope or operation of Article 28 of the Warsaw Convention.

The Subcommittee also concurred with a proposal that, in addition to a formal agreement (IIA2) implementing the IIA, it would be useful for the Secretariat to explore the possibility of adopting IIA2 as an "industry standard", as explained in **Annex 5.**

At the conclusion of the meeting, the Subcommittee unanimously approved and endorsed the final text of the IIA Implementation Agreement, attached **as Annex** 6. In addition to editorial improvements and the insertion of a "severability clause" as set out in Section IV, it was agreed to add the following provision in the Agreement as a new Section III (with the former Section III renumbered as Section V):

> "Furthermore, at the option of a carrier, additional provisions may be included in its conditions of carriage and tariffs, provided they are not inconsistent with this Agreement and are in accordance with applicable law."

The Subcommittee agreed that this addition to the implementation agreement is a general statement unrelated to any specific possible provision which a carrier may wish to include in its conditions of carriage and tariffs.

The Subcommittee accepted a proposal that the "Explanatory Note" issued by the Secretariat with the 31 October 1995 IATA Intercarrier Agreement (IIA) should be filed with governments together with the IIA.

The Subcommittee further agreed that a target date for filing the IIA and IIA2 in Washington and Brussels should be set for no later than 26 April 1996. Noting that the likelihood of governmental approval would be enhanced by widespread support of the IIA and IIA2, the participants at the meeting urged the Secretariat to secure as many signatures as possible in the intervening timeframe. The Regional Airline Association representatives indicated their support for this proposal and the Secretariat committed to working closely with them in an appropriate manner to this end.

Annex 1

Legal Advisory Subcommittee Meeting on Passenger Liability Montreal, 3 April 1996

Attendance List

	Airline	*Name*
1.	Air Canada	**DesBois** Cameron
2.	Air France	Folliot **Michel**
3.	Air Malta	**Spiteri** Christopher
4.	Avianca	**Dueri Eduardo** (also for *AITAL*)
5.	American Airlines	**McNamara** Anne
6.	American Airlines	**Brashear** Jim
7.	British Airways	Walder Ken
8.	British Airways	**Jasinski** Paul
9.	Canadian Airlines International	Fredeen Ken
10.	**Cathay** Pacific	Bass Philip
11.	Delta Airlines	Mayo Gerry
12.	Delta Airlines	**Parkerson** John
13.	Deutsche Lufthansa	Adenauer-Frowein Bettina
14.	Deutsche Lufthansa	**Santangelo** Anthony A.
15.	Deutsche Lufthansa	**Müller-Rostin** Wolf
16.	**Egyptair**	Sherif Hussein (for AACO also)
17.	**Egyptair**	**Hafez** Ahmed
18.	**El Al Israel Airlines**	**Zussman Ephraim A.**
19.	**Japan Airlines**	**Miyoshi Susumu**
20.	**Japan Airlines**	**Tompkins George**
21.	**Kuwait Airways**	**Alhazaa Mona**
22.	**Kuwait Airways**	**Alroumi Rasha**
23.	**Royal Jordanian**	**Baq'ain Hani**
24.	**SAS**	**Westerstad Hans**
25.	**Swissair**	**Hodel Andres**
26.	**TACA/Kuwait Airways**	**Whalen Thomas**
27.	**TAP - Air Portugal**	**José de Bettencourt Rodrigues**

Legal Advisory Subcommittee Meeting on Passenger Liability Montreal, 3 April 1996

Attendance List

	Regional Association	*Name*
1.	AACO	Sherif Hussein (for Egyptair also)
2.	AEA	Frisque Marc
3.	AFRAA	Makonnen Aberra
4.	AITAL	Dueri Eduardo (for Avianca also)
5.	ATA	Warren Robert
6.	ATA Counsel	Dean Warren
7.	OAA	Trent Judith

	Governmental Body	*Name*
1.	European Commission	Colucci Anna

	IATA Secretariat	*Name*
1.	IATA Legal	Clark Lorne
2.	IATA Legal	Donald Rob
3.	IATA Washington	O'Connor David
4.	IATA Insurance	Kelly Tony
5.	IATA Washington Counsel	Rein Bert

Annex 2

IATA Legal Advisory Subcommittee on Passenger Liability

Montreal, 3 April 1996

AGENDA

Item I	CHAIRMAN'S OPENING REMARKS
Item 2	SECRETARIAT REVIEW OF MEETING DOCUMENTATION
Item 3	PRESENTATION BY ATA/U.S. CARRIERS
Item 4	UPDATE BY AEA/EUROPEAN CARRIERS AND OTHER REGIONAL ASSOCIATIONS
Item 5	REVIEW OF THE DRAFT IMPLEMENTATION TEXT AND FORMAT ALTERNATIVES
Ztem 6	IMMEDIATE FOLLOW-UP ACTION, INCLUDING DATES FOR FILING WITH GOVERNMENT AUTHORITIES
Item 7	ANY OTHER BUSINESS

Annex 3

IATA Legal Advisory Subcommittee on Passenger Liability

Montreal, 3 April 1996

UPDATED INDEX OF DOCUMENTATION

DOT Order 96-3-46, 21 March 1996	**WP 1.**
IATA Intercarrier Agreement and List of Signatories as at 25 ***March 1996***	**WP 2.**
Report of the Legal Advisory Group Subcommittee meeting, Miami, *3 I* January - *I* February 1996 ***(without aftacltttettts)***	**WP 3.**
Report of IATA and Non-US Carrier Meeting with DOT, Washington, 14 February 1996	**WP 4.**
Letter from Ms Nancy E. McFadden, DOT General Counsel, 12 March 1996	**WP 5.**
Report on 13 March 1996 meeting with U.S. DOT on IIA Implementation	**WP 6.**
Draft implementation text (IIA2)	**WP 7.**
Paper submitted by ATA/U.S. carriers	*WP 8.*
Paper submitted by AEA/European carriers	**WP** *9.*
Message dated 2 April 1996 from Singapore Airlines	**WP 10**
Letter dated 3 April 1996 from Anthony Mercer, Air New Zealand	**WP 11**

Information Papers

Article by Harold Caplan - Lloyd's Aviation Law Vol. 15, No. 5 - 1 March 1996	**Info Paper 1**
Fax dated 1 April 1996 from Mr R. Benjamin, Executive Secretary - ECAC	**Info Paper 2**
ICAO Council - 147th Session - Report on Modernization of the "'Warsaw System" (Document C-WP/10381, 5/3/96)	**Info Paper 3**

The ATA Draft Attempts to Reconcile Concerns of International Carriers and U.S. Domestic Political Concerns

- ATA has developed a compromise draft implementing agreement and special contract. It is designed to respond to the serious concerns raised by international carriers while addressing U.S. domestic political concerns.

- The draft meets the requirements of the IIA. It includes draft IATA language to waive the limit of liability. It does not, however, attempt to satisfy all of the DOT guidelines. For example, it preserves Article 20 defenses above 100,000 SDR. Nevertheless, the ATA believes that the draft will be considered acceptable by the U.S. government. A significant feature of the compromise draft is that. it permits claimants to bring cases before the courts where they are domiciled.

- In the United States, an important concern with the operation of the Warsaw system is whether victims of air disasters and their families are able to have their cases heard before courts of their own nationality so that their compensation can be determined consistent with their national expectations. This concern has been raised repeatedly in political debate on the operation of the Warsaw Convention, including hearings before the Senate Foreign Relations Committee.

- These concerns lie behind DOT's February 1995 guideline that all U.S. nationals traveling abroad should have access to U.S. courts. In the face of the strong concerns that are likely to be raised by family groups and legislators on their behalf, DOT cannot be expected to approve an agreement that fails to address this concern adequately.

- Article 28(1) of the Warsaw Convention permits a claimant to bring an action for damages in one of *the* following four places:

  (1) The carrier's domicile;

  (2) The carrier's principal place of business;

  (3) The place of business through which the contract has been made; or

  (4) The place of destination.

- Under subparagraph 5 of the draft special contract, the passenger and carrier would agree to consider the contract of carriage to have been made through the carrier's "place of business" in the territory of the passenger's domicile. This provision is generally consistent with the approach of the proposed E.U. regulation.

- Under Article 28 of the Convention, this would permit the claimant to bring an action in a court in his or her domicile. The compromise would permit claimants to bring an action in courts of the passenger's domicile. In effect, it would add the practical equivalent of a 'fifth basis of jurisdiction" under Article 28. It does not quite go as far as DOT had hoped in that it would not cover all U.S. nationals traveling abroad, but ATA is of the view that it will be acceptable *to* DOT. In her March 12, 1996 letter, Ms. McFadden, DOT General Counsel states unequivocally that the fifth basis of jurisdiction must be retained.

- The draft implementing agreement is attached. In addition to the essential elements implementing the IIA, the agreement addresses other matters, including the notice required by the Convention. These provisions will be required in any filing with DOT to replace the Montreal Agreement.

- Also attached is a legal analysis of the fifth basis of jurisdiction prepared by Warren Dean (in consultation with Professor Bin Cheng) and presented to the 30th Annual SMU Air Law Symposium in February 1996.

AGREEMENT IMPLEMENTING THE IATA INTERCARRIER AGREEMENT
(Draft Implementation)

Pursuant to the IATA Intercarrier Agreement of 3 1 October 1995, each of the undersigned carriers ("the Carriers") shall, on or before November 1, 1996, include the following in its conditions of carriage, including tariffs embodying conditions of carriage filed by it with any government:

1. The Carrier agrees in accordance with Article 22(1) of The Convention for the Unification of Certain Rules Relating to International Transportation by Air signed at Warsaw October 12, 1929, [as amended by the Protocol done at The Hague on 28 September 1955]* ("the Convention") that, as to all international [carriage] * transportation hereunder as defined in the Convention:

   (1) The Carrier shall not invoke the limitation of liability in Article 22(1) of the Convention as to any claim for compensatory damages arising under Article 17 of the Convention.

   (2) The Carrier agrees that, subject to applicable law, recoverable compensatory damages for such claims may be determined by reference to the law of the domicile or permanent residence of the passenger.

   (3) The Carrier shall not avail itself of any defenses under Article 20(1) of the Convention with respect to that portion of such claim that does not exceed 100,000 SDRs. * *

   (4) Except as otherwise provided in paragraphs 1 and 3 hereof, the Carrier reserves all defenses available under the Convention to such claims. With respect to third parties, the Carrier reserves all right of recourse against any other person, including without limitation rights of contribution and indemnity.

   (5) For the purposes of Article 28 of the Convention and in addition to any other place specified in that Article, the contract of international [carriage]' transportation shall be considered to have been made through the Carrier's place of business, if any, in the territory of the domicile or (if applicable) permanent residence of the passenger.

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* Language to be used by Carriers certificated in jurisdictions where The Hague Protocol is in force.

** Special Drawing Rights.

II. Each Carrier shall, at the time of delivery of the ticket, furnish to each passenger whose transportation is governed by the Convention, the following notice:

"ADVICE TO INTERNATIONAL PASSENGERS ON CARRIER LIABILITY

Passengers on a journey involving an ultimate destination or a stop in a country other than the country of departure are advised that a treaty known as the Warsaw Convention may apply to the entire journey, including any portion thereof entirely within a country. For such passengers, the Warsaw Convention and special contracts of carriage embodied in applicable tariffs may govern the liability of the Carrier for death of or injury to passengers. The names of Carriers party to such special contracts are available at all ticket offices of such Carriers and may be examined upon request."

III. The effectiveness of this Agreement shall terminate the Carrier's participation in, and adherence to, the intercarrier agreement, approved by CAB Order E-23680 and dated May 13, 1966, relating to the liability limits of the Convention for the Unification of Certain Rules Relating to International Transportation by Air signed at Warsaw October 12, 1929. The Carrier shall file the special contract set forth in Paragraph I herein as a replacement for the special contract set forth in said intercarrier agreement.

IV. Nothing in this Agreement shall be deemed to affect the rights of the passenger, the claimant and/or the carrier under the Convention other than as set forth in Paragraph I herein.

V. The Carrier shall encourage other carriers engaged in international [carriage]' transportation as defined in the Convention to become party to this Agreement.

VI. This Agreement shall be filed with the U.S. Department of Transportation for approval pursuant to 49 U.S.C. sections 41308 and 41309 and filed with other governments as required. This Agreement shall become effective upon approval by that Department under 49 U.S.C. section 41309, and action by that Department to authorize adherence to this Agreement as a replacement for the intercarrier agreement referred to in paragraph III of this Agreement.

VII. This Agreement may be signed in any number of counterparts, all of which shall constitute one Agreement. Any carrier may become a party to this Agreement by signing a counterpart hereof and depositing it with the U.S. Department of Transportation.

_____

(signature and title)

_____

(name of Carrier)

_____

(address of Carrier)

March 29, 1996

AGREEMENT

The undersigned carriers (hereinafter referred to as "the Carriers") hereby agree as follows:

1. Each of the Carriers shall, effective May 16, 1966, include the following in its conditions of carriage, including tariffs embodying conditions of carriage filed by it with any government:

"The Carrier shall avail itself of the limitation of liability provided in the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw October 12th, 1929, or provided in the said Convention as amended by the Protocol signed at The Hague September 28th, 1955. However, in accordance with Article 22(1) of said Convention, or said Convention as amended by said Protocol, the Carrier agrees that, as to all international transportation by the Carrier as defined in the said Convention or said Convention as amended by said Protocol, which, according to the contract of Carriage, includes a point in the United States of America as a point of origin, point of destination, or agreed stopping place

(1) The limit of liability for each passenger for death, wounding, or other bodily injury shall be the sum of US $75,000 inclusive of legal fees and costs, except that, in case of a claim brought in a State where provision is made for separate award of legal fees and costs, the limit shall be the sum of US $58,000 exclusive of legal fees and costs.

(2) The Carrier shall not, with respect to any claim arising out of the death, wounding, or other bodily injury of a passenger, avail itself of any defense under Article 20(1) of said Convention or said Convention as amended by said Protocol.

Nothing herein shall be deemed to affect the rights and liabilities of the Carrier with regard to any claims brought by, on behalf of, or in respect of any person who has willfully caused damage which resulted in death, wounding, or other bodily injury of a passenger."

2. Each Carrier shall, at the time of delivery of the ticket, furnish to each passenger whose transportation is governed by the Convention, or the Convention as amended by the Hague Protocol, and by the special contract described in paragraph 1, the following notice, which shall be printed in type at least as large as 10 point modern type and in ink contrasting with the stock on (i) each ticket; (ii) a piece of paper either placed in the ticket envelope with the ticket or attached to the ticket; or (iii) on the ticket envelope:

"ADVICE TO INTERNATIONAL PASSENGER ON LIMITATION OF LIABILITY

Passengers on a journey involving an ultimate destination or a stop in a country other than the country of origin are advised that the provisions of a treaty known as the Warsaw Convention may be applicable to the entire journey, including any portion entirely within the country of origin or destination. For such passengers on a journey to, from, or with an agreed stopping place in the United States of America, the Convention and special contracts of carriage embodied in applicable tariffs provide that the liability of
[certain]*
[(name of carrier) and certain other] carriers parties to such special contracts for death of or personal injury to passengers is limited in most cases to proven damages not to exceed US $75,000 per passenger, and that this liability up to such limit shall not depend on negligence on the part of the carrier. For such passengers traveling by a carrier not a party to such special contracts or on a journey not to, from, or having an agreed stopping place in the United States of America, liability of the carrier for death or personal injury to passengers is limited in most cases to approximately US $10,000 or US $20,000.

The names of Carriers parties to such special contracts are available at all ticket offices of such carriers and may be examined on request.

Additional protection can usually be obtained by purchasing insurance from a private company. Such insurance is not affected by any limitation of the carrier's liability under the Warsaw Convention or such special contracts of carriage. For further information please consult your airline or insurance company representative."

3. [The Agreement was filed with the Civil Aeronautics Board of the United States. The Board approved it by Order E-23680, adopted May 13, 1966. The Agreement (Agreement 18900) became effective May 16, 1966. On January 1, 1985, this Agreement became the responsibility of the Department of Transportation (DOT) by operation of law.]

4. This Agreement may be signed in any number of counterparts, all of which shall constitute one Agreement. Any Carrier may become a party to this Agreement by signing a counterpart hereof and depositing it with DOT.

5. Any Carrier party hereto may withdraw from this Agreement by giving twelve (12) months' written notice of withdrawal to DOT and the other Carriers parties to the Agreement.

* Either alternative may be used.

[signature and title]

[name of carrier]

[address of carrier]

Annex 5

Possible Adoption of IIA Implementing Agreement (IIA2) as an "Industry Standard"

The purpose of IIA2 is to standardise implementation of the IIA for the benefit of passengers and of carriers participating, in the interline system. Standardisation responds to the concerns of many governments and would facilitate multiple destination travel on a single ticket using the services of more than one carrier, which is the critical objective of interline coordination.

Under the Provisions for the Conduct of the IATA Traffic Conferences, IATA Services Conferences frequently adopt uniform contract provisions -- e.g., standard form agency contracts -- which become legally operative only when further agreed between airlines and other parties. IIA2 which will become operative between passengers and carriers only when adopted in individual carrier tariffs is clearly within the class of agreements amenable to such interline standardisation.

The Provisions contemplate, under the term "Industry Standard", a situation "where uniformity among all Members is considered necessary for interline service but because of their developmental, technological or operational nature not all carriers follow these procedures." (Art. VlIl.5.) This "Industry Standard" concept would seem appropriate to IIA2 since certain carriers, consistent with the policies of governments on the routes they serve, may modify or defer adherence, and other carriers may supplement IIA2's standard terms or exercise their right to include the options available under IIA2.

Thus, **in addition to seeking formal signature of IIA2** which would bind individual carriers, IATA could present IIA2 to a major IATA organ where it could be endorsed as equivalent to an "Industry Standard"- i.e., as "an implementing format whose uniform use in carrier tariffs is considered necessary for interline service but which may not be followed because of the special developmental or operational nature of a carrier", or to the worldwide Passenger Services Conference. In so doing, IATA would give **IIA2** presumptive validity in the airline community and demonstrate to governments that IATA Members are actively taking steps to encourage broad adherence to the IIA, and IIA2, as set forth in IIA Paragraph 4.

IATA

AGREEMENT IMPLEMENTING THE IATA INTERCARRIER AGREEMENT **

I Pursuant to the IATA Intercarrier Agreement of 31 October 1995, the undersigned carriers agree to implement said Agreement by incorporating in their conditions of carriage and tariffs, where necessary, the following:

1. {CARRIER} shall not invoke the iimitation of liability in Article 22(1) of the Convention as to any claim for recoverable compensatory damages arising under Article 17 of the Convention for death or bodily injury.

2. {CARRIER) shall not avail itself of any defence under Article 20(1) of the Convention with respect to that portion of such claims which does not exceed 100,000 SDRs* [unless option II(2) is used].

3. Except as otherwise provided in pamgraphs I and 2 hereof, (CARRIER) reserves all &fences available under the Convention to such claims. With respect to third parties, the carrier also reserves all rights of recourse, contribution or indemnity in accordance with applicable law.

II At the option of the carrier, its conditions of carriage and tariffs also may include the following provisions:

1. {CARRIER) agrees that subject to applicable law, recoverable compensatory damages for such claims may be determined by reference to the law of the domicile or permanent residence of the passenger.

2. (CARRIER) shah not avail itself of any defence under Article 20(1) of the Convention with respect to that portion of such claims which does not exceed 100,000 SDRs, except that such waiver is iimited to the amounts shown below for the routes indicated, as may be authorised by governments concerned with the transportation involved.

[Amounts and routes to be inserted]

3. Neither the waiver of limits nor the waiver of defences shah he applicable in respect of claims made by public social insurance or similar bodies however asserted. Such claims shah be subject to the iimit in Article 22(1) and to the defences under Article 20(1) of the Convention. The carrier will compensate the passenger or his dependents for recoverable compensatory damages in excess of payments received from any public social insurance or similar body.

III 1. Furthermore, at the option of a carrier, additional provisions may he included in its conditions of carriage and tariffs. provided they are not inconsistent with this Agreement and are in accordance with applicable law.

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* Defined if necessary.

** Subject to editorial changes and clearance by meeting participants as to definitive final text.

Iv 1. Should any provision of this Agreement or a provision incorporated in a condition of carriage or tariff pursuant to this Agreement be determined to be invalid, illegal or unenforceable by a court of competent jurisdiction, **all** other provisions shall nevertheless remain **valid,** binding and effective.

V 1. This Agreement may be signed in any number of counterparts, **all** of which **shall** constitute one Agreement Any **carrier** may become party to this Agreement by signing a counterpart hereof and depositing it **with** the Director General of the International Air Transport Association **(IATA).**

2. Any carrier party hereto may withdraw from this Agreement by giving twelve (12) **months'** written notice of withdrawal to **the** Director General of **IATA** and to the other carriers parties to the Agreement.

3. The Director General of IATA shall declare this Agreement effective on November 1st. 1996 or such later date as all requisite Government approvals have been obtained for this Agreement and **the** IATA **Intercarrier** Agreement of 31 October 1995.

Signed this **____ day of** _____ 1996

International Air Transport Association

IATA CENTRE, ROUTE DE L'AEROPORT 33. P.O. BOX 672
CH-1215 GENEVA 15 AIRPORT SWITZERLAND
TELEPHONE: (022) 799.2525 - TELEX: 415566 - CABLES: IATA GENEVA
DIRECT DIAL NUMBER: +4122 799 29 FAX: +4122 799 2685

MEMORANDUM

To : Participants, IATA Legal Advisory Group Subcommittee on Passenger Liability

From : Lorne S. Clark

Date : *26* March 1996

Ref : G/3069/dd

Subject: **IATA Legal Advisory Group Subcommittee on Passenger Liability, Montreal 3 April 1996 - AGENDA & DOCUMENTATION**

Enclosed herewith is the proposed Agenda and documentation for the meeting of the Legal Advisory Group Subcommittee to be held on 3 April at the IATA Head Offices in Montreal. We are awaiting papers from the ATA/U.S. carriers and from AEA/European carriers which will be distributed later.

Should you have any items you wish to be included on the agenda or additional documentation, please advise the Secretariat at the earliest opportunity.

We look forward to seeing you in Montreal.

With best regards.

Lorne S. Clark
General Counsel and Corporate Secretary

Encl.

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IATA Legal Advisory Group Subcommittee on Passenger Liability

Montreal, 3 April 1996

AGENDA

Item 1	CHAIRMAN'S OPENING REMARKS
Ztem 2	SECRETARIAT REVIEW OF MEETING DOCUMENTATION
Item 3	PRESENTATION BY ATA/U.S. CARRIERS
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Ztem 7	ANY OTHER BUSINESS

IATA Legal Advisory Group Subcommittee on Passenger Liability

Montreal, 3 April 1996

INDEX OF DOCUMENTATION

Information Papers

Order 96-3-46

SERVED MAR 2 1 1996

UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.

Issued by the Department of Transportation
on the 21st day of March, 1996

International Air Transport Association

AGREEMENT RELATING TO LIABILITY LIMITATIONS OF THE WARSAW CONVENTION

Docket OST-95-232
(49152)

ORDER EXTENDING DISCUSSION AUTHORITY

By Orders 95-2-44, 95-7-15, and 96-L-25 the Department granted and extended discussion authority and antitrust immunity to IATA for the purpose of reaching an Agreement among carriers to waive the liability limits of the Warsaw Convention. In Order 95-2-CC we agreed with IATA that the Montreal intercarrier Agreement of 1966 must be brought up to date, and we set forth guidelines for such an agreement which reflect the basic objectives which we have pursued in our efforts to teturc ratification of the Montreal Protocols and creation of a supplemental compensation plan.[1] Orders 95-7-15 and 96-l-25 incorporated the same guidelines. The discussion authority expires on April 1, 1996.

As a result of the IATA discussions, an IATA Intercarrier Agreement (IIA) was unanimously endorsed at the IATA Annual General Meeting in Kuala Lumpur on October 31, 1995, which requires signatory carriers to take action, by November 1, 1996, to waive the Convention's limitation of passenger liability, "so that recoverable compensatory damages may be determined and awarded by reference to the law of the domicile of the passenger," and to encourage other carriers to do the same.[2] There was further consideration of the

[1] Order 95-2-44, at p. 3.

[2] IATA has provided the Department with copies of the final resolution and the Intercarrier Agreement in a letter dated November 27, 1995.

IIA and its implementation at an IATA meeting in Miami on January 31, 1996. Productive discussions between the Department and IATA representatives indicate that further IATA discussion8 regarding the plan to implement the Intercarrier Agreement would be useful before these agreements are filed with Governments for approval.

In order to facilitate the further discussions, the Department is *sua sponte* extending the April 1, 1996 expiration date of the discussion authority and related antitrust immunity to July 1, 1996. Other than a change in the data for expiration of the discussion authority and related antitrust immunity, no ether changes are being made to Order 96-1-25. ,

ACCORDINGLY:

1. The date April1, 1996 shall be deleted from Ordering paragraph 1 of Order 96-1-25, and the date July I, 1996 substituted in place thereof.

2. Except as provided in paragraph 1 of this Order, Order 96-1-25 shall remain in full force and effect according to its terms, without other modification.

3. We will serve a copy of this order on all parties in the above-titled docket, and on the Departments of State and Justice.

BY:

CHARLES A. HUNNICUTT
Assistant Secretary for Aviation
and International Affairs

(SEAL)

An *electronic version of* this *document is* available OR *the World Wid Web at:*
http://www.dot.gov/dotinfo/general/orders/aviation.html

INTERCARRIER AGREEMENT ON PASSENGER LIABILITY

WHEREAS: The Warsaw Convention system is of great benefit to international air transportation; and

NOTING THAT: The Convention's limits of liability, which have not been amended since 1955, are now grossly inadequate in most countries and that international airlines have previously acted together to increase them to the benefit of passengers;

The undersigned carriers agree

1. To take action to waive the limitation of liability on recoverable compensatory damages in Article 22 paragraph 1 of the Warsaw Convention* as to claims for death, wounding or other bodiiy injury of a passenger within the meaning of Article 17 of the Convention, so that recoverable compensatory damages may be determined and awarded by reference to the law of the domicile of the passenger.

2. To reserve all available defences pursuant to the provisions of the Convention; nevertheless, any carrier may waive any defence, including the waiver of any defence up to a specified monetary amount of recoverable compensatory damages, as circumstances may warrant.

3. To reserve their rights of recourse against any other person, including rights of contribution or indemnity, with respect to any sums paid by the carrier.

4. To encourage other airlines involved in the international carriage of passengers to apply the terms of this Agreement to such carriage.

5. To implement the provisions of this Agreement no later than 1 November 1996 or upon receipt of requisite government approvals, whichever is later.

6. That nothing in this Agreement shall affect the rights of the passenger or the claimant otherwise available under the Convention.

7. That this Agreement may be signed in any number of counterparts, all of which shall constitute one Agreement. Any carrier may become a party to this Agreement by signing a counterpart hereof and depositing it with the Director General of the International Air Transport Association (IATA).

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* *"WARSAW CONVENTION" as used herein means the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw, 12th October 1929, or that Convention as amended at The Hague, 28th September 1955, whichever may be applicable.*

8. That any carrier party hereto may withdraw from this Agreement by giving twelve (12) months' written notice of withdrawal to the Director General of IATA and to the other carriers parties to the Agreement.

Signed this day of _____ 199__

List of Carriers Signatories to the IATA Intercarrier Agreement
As at 25 March 1996

Carrier		Date of Signature
1.	Air Canada	31 Oct 95
2.	Air Mauritius	31 Oct 95
3.	Austrian Airlines	31 Oct 95
4.	Canadian Airlines Intl	31 Oct 95
5.	Egyptair	31 Oct95
6.	Japan Airlines	31 Oct 95
7.	KLM Royal Dutch Airlines	31 Oct 95
8.	Saudi Arabian Airlines	31 Oct 95
9.	Scandinavian Airlines System	31 Oct 95
10.	South African Airways	31 Oct 95
11.	Swissair	31 Oct 95
12.	TACA	31 Oct 95
13.	Aer Lingus	09 Dec 95
14.	Finnair	11 Dec 95
15.	Icelandair	11 Dec 95
16.	Aeromexpress	11 Dec 95
17.	LAPSA Air Paraguay	12 Dec 95
18.	Kenya Airways	13 Dec 95
19.	Air Afrique	14 Dec 95
20.	Croatia Airlines	15 Dec 95
21.	Trinidad & Tobago BWIA International	15 Dec 95
22.	Jet Airways (India)	18 Dec 95
23.	Varig S.A.	19 Dec 95
24.	TAP Air Portugal	20 Dec 95
25.	Air UK Group Limited	11 Jan 96
26.	VIASA	17 Jan 96
27.	Garuda Indonesia	01 Feb 96
28.	Royal Air Maroc	28 Feb 96
29.1	Crossair	08 Mar 96

Report of Meeting of the IATA Legal Advisory Subcommittee on Passenger Liability, Miami 31 January - 1 February 1996

Following receipt of DOT Immunity Extension Order No 96-l-25 of 23 January 1996, a Subcommittee meeting was convened in Miami 3 1 January - 1 February 1996 to discuss implementation of the IATA Intercarrier Agreement (IIA), opened for signature in Kuala Lumpur 3 1 October 1995.

As required by the Immunity Order, representatives of the US government were invited, but were unable to participate. In addition to the appointed Subcommittee members, US carriers and representatives of all airlines signatory to the IIA were invited to the Miami meeting.

The Subcommittee session was chaired by Mr Cameron DesBois (Air Canada) and attended by representatives of 24 airlines, 5 Regional Airline Associations and the European Commission (DG VII). The list of participants is set out in **Annex 1, the** Agenda in **Annex** 2 and the list of documents provided for the meeting in **Annex 3.**

To put the discussions in appropriate perspective and to brief participants who had not been fully involved in the Airline Liability Conference exercise, the Chairman gave a brief introductory slide presentation. This is attached **as Annex 4.**

The discussion on the remaining Agenda items focussed mainly on the following issues:

- the principle of waiver by the airlines of the Warsaw Convention limitation of liability
- implementation of the IIA
- whether implementation should include any element of "strict liability", and if so up to what amount
- the "law of the domicile" provision as referred to in the IIA
- a "fifth jurisdiction" (in addition to the four jurisdictions specified in Warsaw Convention Article 28)
- additional IIA implementation options to be available to carriers
- Alternative dispute resolution (arbitration)
- reports to Governments

Waiver of Warsaw Convention limitation of liability

The Subcommittee reaffirmed the basic provision in the IIA that signatory carriers are obliged to "take action" to waive the Warsaw Convention Article 22 (1)

limitation on liability, irrespective of how the recoverable compensatory damages were to be determined.

Implementation of the IIA

The Subcommittee reaffirmed that the IIA could be implemented by means of individual tariff filings acceptable to governments (as in the existing situation respecting Japanese airlines), or by means of an implementing Intercarrier Agreement acceptable to governments. After some discussion, the members of the Subcommittee agreed that **an Intercarrier Implementation Agreement (IIA2)** should be developed in Miami.

Strict liability. and if so up to what amount

The Subcommittee agreed that carriers should, in principle, waive their Warsaw Convention Article 20(1) defence vis-a-vis passengers up to an amount no higher than SDRs 100.000. Nevertheless, as indicated below and set out in IIA2, carriers would **still** have **the option** of retaining this defence, either in whole or in part, on specifically identified routes, subject to authorisation of the governments concerned.

Law of the domicile in the IIA

The IIA provision regarding determination of damages by reference to domiciliary law is spelled out more precisely in IIA2. Use of this provision is at **the option** of the carrier, as indicated in the IIA.

Fifth jurisdiction

Noting that US carriers continued to believe that IIA2 should deal with this issue, all other Subcommittee members made it clear that they cannot accept the "fifth jurisdiction*' and insisted that this could only be addressed by governments in the context of eventual amendment of the Warsaw Convention. Working Paper 5 of the meeting documentation sets out an authoritative legal opinion containing the following unequivocal assertion: ***"States parties to the Convention are bound by these provisions and cannot, without ignoring their obligations, allow passenger actions in jurisdictions other than those which are fixed by the list in Article 28".***

Additional IIA implementation ontions

Reviewing the results of the Drafting Committee deliberations, most of the Subcommittee members agreed to include in the text of IIA2 two specific carrier options in addition to applicability of the law of the domicile for determination of damages. These options allow for incorporating in the conditions of carriage of provisions for the retention of Warsaw Convention defences on particular routes, if

authorised by government, and retention of Convention limitation of liability as well as defences vis-a-vis "public social insurance or similar bodies".

Alternative dispute resolution (arbitration)

Working Paper 8 of the meeting documentation sets out a proposal on development of an alternative dispute resolution mechanism. Taking into account this approach could, possibly, go some way towards meeting US government concerns that its citizens or permanent residents impeded from litigating in the US should nevertheless have access to a US forum, the Subcommittee agreed that at least two

carriers should be members of the IATA/ICC Working Party(WP). Subsequently, the representatives of Air France and Swissair accepted to participate in the WP, a meeting of which is scheduled in Paris 1 March 1996.

A Drafting Committee composed of Subcommittee Chairman DesBois and representatives of British Airways, KLM, Swissair and Japan Airlines, assisted by the IATA Secretariat, met on 31 January and submitted a proposed IIA2 to the full Subcommittee on 1 February. After detailed discussion and incorporation of suggested revisions, the Chairman called for an indicative vote on the text of the Intercarrier Implementation Agreement. All Subcommittee members, with the exception of the two US carrier representatives who abstained, expressed agreement with the document, subject to editorial corrections which were left to the Secretariat

Renort to governments

The Subcommittee agreed with the US carriers' suggestion that, in advance of formally filing the Report of the Miami meeting (as required by the Immunity Order), the IATA Secretariat should arrange for an information exchange meeting with DOT as soon as mutually convenient. In particular this would allow non-US carriers to present their views on IIA implementation, and the background to the drafting of IIA2, directly to US officials. (A meeting was subsequently organised in Washington on 14 February 1996.) The European carrier representatives also agreed that, following the 14 February meeting of the AEA on liability issues, those airlines would make known their views on IIA implementation to ECAC and to the European Commission.

The text of IIA2, as finalised by the Secretariat, is attached **as Annex 5** to this Report.

IATA and Non-US Carrier Meeting with DOT
Washington, 14 February 1996

The US side was heeded by the newly appointed General Counsel of DOT, Ms Nancy McFadden, and included DOT Assistant General Counsel for International law Don Horn (who has been responsible for liability issues up to now), Deputy Assistant Secretary for Aviation and International Affairs, Patrick Murphy, and two other senior officials from the Department. Airlines represented were: AC (LAG Chairman DesBois); BA; AF; SAS; JL; TACA; and MX, VE and VP. In addition, OAA was represented by Judith Trent of Global Aviation Associates, and ATA General Counsel, Bob Warren attended as an Observer. IATA's Washington Director David O'Connor, IATA Washington Counsel Bert Rein and Lorne Clark attended for IATA.

The receipt of the faxed report (attached herewith) of the AEA meeting in Brussels that very morning, stressing that the Miami agreement was as far as the European carriers were willing to go, was very helpful in reinforcing the visitors' position.

The meeting took over two hours and was cordial and frank, and conducted in a business-like atmosphere.

Summary -

- Ms McFadden (who made an excellent impression on IATA/Airline Representatives) seemed to appreciate the carriers' concerns and, in particular, the real differences between the US and non-US airlines;
- the very forceful intervention of the AF/SAS Representative, following a detailed IATA explanation, went a long way to effectively "bury" the fifth jurisdiction issue as far as the non-US carriers are concerned;
- IATA agreed to file the Miami Report with an information text (not yet the formal filing) of the Miami agreement on 15 February, giving DOT (and the ATA) a 24 hour advance copy in case there were any issues they wished to raise. (No reaction was received from either the DOT or ATA);
- IATA advised DOT that the Secretariat intended to formally file all agreements reached during the Airline Liability Conference (ALC) exercise, as required under the DOT immunity orders and the decisions of the ALC, no later than the expiry of the current DOT immunity i.e. 1 April 1996, but that the two sides would confer in advance on details;
- to the IATA/ICC arbitration initiative, and IATA agreed that US carrier Representatives could participate if they so wished and in any case IATA would keep DOT fully informed of developments. (The next Joint Working Party meeting is in Paris 1 March 1996);
- the door was left open for another meeting after DOT had consulted with the Departments of State and Justice on the Miami Meeting Report. Nevertheless, it was clearly understood that there was little if any room for the non-US airlines to negotiate over the contents of the Miami agreement, with the possible exception of the precise amount of "strict liability" i.e. waiver by carriers of the Art 20(1) defence (agreed in Miami and set at SDR 100,000).

Lorne S. Clark

WP 5.

U.S. Department of Transportation

General Counsel

400 Seventh St., S.W.
Washington, D.C. 20590

Mr. Lorne S. Clark
General Counsel and Corporate Secretary
International Air Transport Association
IATA Building
2000 Peel Street
Montreal, Quebec, Canada H3A 2R4

March 12, 1966

RECEIVED BY
IATA LEGAL DEPARTMENT
13 MAR 1996

BY FAX (514) 844-6934

Dear Mr. Clark:

As you know, we are scheduled to meet on Wednesday, Mar& 13, at 1:30 p.m., for a follow-up to our prior meeting with you and several of your members on the Warsaw liability issue.

In order to facilitate our conversation, let me share with you our views on the draft intercarrier Agreement drawn up at Miami on February 1. (These views are our current views, and *without* prejudice to the outcome of a regulatory approval proceeding which will follow the formal submission af the IATA agreements for approval and antitrust immunity.)

We are very pleased with the carriers' progress to date. I share with you the *view* that we *now* have a *unique opportunity* to accomplish the goals we have sought for more than three decades. I too believe that working together we can develop an aviation liability regime which will be beneficial for passengers' claimants, as well as the airlines. We couldn't agree more that the time for reconstruction of the long obsolete, and at times disastrous for claimants, Warsaw liability regime may, thanks to your efforts, finally be at hand. However, we do feel that a few changes to the Miami draft will be required.

We were gratified to learn at our last meeting that IATA shares the WT view that a clear, unambiguous and systemwide waiver of all liability limits for passengers and third parties is essential. As we noted at that meeting, the language with respect to third parties will have to be revised to leave no doubt as to this intent. We are willing to work with IATA to provide a possible exception for social agencies outside the United States. Careful drafting will be required to avoid any impact of this exception within the United States.

We are not at this time prepared to accept the proposed two-tier strict liability system, since we are concerned that retention of the Article 20(1) Carrier defenses, and indeed the two tier system itself, may be a aourcc of unnecessary and unduly burdensome litigation. Nevertheless, noting the acceptance of this

concept by the EC Commission, and the apparent desire of many carriers to retain such defenses above a prescribed level, in the went that we can arrive at a near universal liability regime which fully meets our objectives in other areas, we may be able to be more flexible in this area.

As you are aware, a fifth jurisdiction based on the passenger's domicile was an extremely important part of Guatemala/Montreal Protocol 3. We have carefully considered your views, and those of your expert consultant, on the fifth jurisdiction. We have also considered other legal opinions, including that of Bin Cheng. It is our considered conclusion that the fifth jurisdiction is legally defensible, Therefore, we have concluded, as did the EC Commission, that the fifth jurisdiction must be retained.

We are, nevertheless, sensitive to the concerns of IATA's non-U.S. carrier members. Accordingly, we ore willing to study the possibility of adding a passenger option for arbitration as an alternative in addition to *the* fifth jurisdicdon. We are willing to *work* with you to ensure that such a provision would not jeopardize claimants rights, and would provide claimants with the opportunity to select totally independent U.S. citizen arbitrators. We are not, however, persuaded that arbitration would be an appropriate forum for consideration of a carrier's liablity.

We are greatly encouraged by IATA's acceptance of the concept of the applicability of the law of the passenger's domicile for the determination of damages. This was a *major* achievement of the Kuala Lumpur Agreement. We are, however, disturbed at the optional nature of the provision which found its way into the Miami draft. As *noted,* we consider this feature to be one which should apply universally, in order to partially offset the impact of retention of the 1929 Warsaw provisions in situations where the IATA Intercarrier Agreement might otherwise be inapplicable. Moreover, we believe that this provision must be stated in clear, unambiguous and definitive language.

We may have more comments upon further study, particularly with regard to drafting. However, we felt that that we should advise you of our views, so far as they can be formulated at this time. We look forward to meeting with you on March 13.

Sincerely,

Nancy E. McFadden

Nancy E. McFadden
General Counsel

cc:

David M. O'Connor
IATA Regional Director
Washington, D.C.

Attendees at DOT meeting February 14

Report on 13 March 1996 meeting with US DOT on IIA Implementation

The meeting was attended by:

US side
N. McFadden
P. Murphy
D. Horn
P. Schwartzkopf

IATA/Airline side
L. Clark/XB
C. DesBois/AC
A. McNamara/AA
G. Mayo/DL
R. Warren/ATA
T. Whalen/TACA
J. Brashear/AA
D. O'Connor/XB

The discussion mainly focused on the 12 March letter from the DOT General Counsel, copy attached, and where we go from here.

MS McFadden in particular responded to expressions of serious concern that the letter seemed to indicate DOT's rejection of the proposed IIA implementing provisions. She stated quite forcefully that this was not the case. It was fully recognised by the US authorities that the carriers had made tremendous progress in securing widespread support for waiving liability limitations and moving towards determination of damages by reference to the law of the passenger's domicile. Nevertheless, the US strongly desired that the latter be a *mandatory* provision, and that a claimant also be permitted to litigate in the territory of the passenger's domicile when this was not a forum available under the existing rules. A solution to these issues would, in DOT's view, facilitate acceptance of a fixed limit on "strict" liability, *i.e.* preservation of Article 20(1) defences for the carrier above a specific amount.

The IATA/airline representatives explained and defended the position adopted at the Miami meeting and the text emanating therefrom. In particular, it was argued that carriers could not amend the Warsaw Convention, which was a matter for governments, and that many airlines take the position that it is inconsistent with the Convention to create a "fifth jurisdiction". The DOT noted that there were different legal opinions on this, and they were supportive of the opposing view.

DOT offered, and IATA accepted, a 30 day extension of the Immunity Order (due to expire 1 April) to allow for a Legal Subcommittee meeting to reconsider the Miami text in light of the discussion with DOT. This meeting has now been called for 3 April at the IATA offices in Montreal, starting at 0930 hours.

While DOT's position is admittedly quite firm, it is also a fact that at least some degree of possible flexibility was indicated, since they very much desire than an acceptable "'package" be agreed with the carriers quickly. They thus encouraged IATA/airline representatives to seek some flexibility on the part of the airlines, and to give serious m-consideration to the two critical issues: law of the domicile and fifth jurisdiction. The IATA/airline representatives offered no special encouragement on this, only to assure their interlocutors that DOT's views would be reviewed carefully at the forthcoming meeting.

Despite the somewhat sharp content of the 12 March letter (which in fact restates what is in the DOT "guidelines" of February 1995), we believe that there may be a possibility of mutual accommodation. The Secretariat will be consulting with the ATA on preparing a background paper for 3 April to assist in the discussion.

PROVISIONS TO IMPLEMENT THE IATA INTERCARRIER AGREEMENT

I.

1. {CARRIER} shall not invoke the limitation of liability in Article 22(1) of the Convention as to any claim for recoverable compensatory damages arising under Article 17 of the Convention for death or bodily injury.

2. {CARRIER} shall not avail itself of any defence under Article 20(1) of the Convention with respect to that portion of such claims which does not exceed 100,000 SDRs* [unless option 11(2) is used].

3. Except as otherwise provided in paragraphs 1 and 2 hereof, {CARRIER} reserves all defences available under the Convention to such claims and, with respect to third parties, also reserves all rights of recourse, contribution or indemnity in accordance with applicable law.

II. At the option of the carrier, its conditions of carriage and tariffs also may include the following provisions:

1. {CARRIER} agrees that subject to applicable law, recoverable compensatory damages for such claims may be determined by reference to the law of the domicile or permanent residence of the passenger.

2. {CARRIER} shall not avail itself of any defence under Article 20(1) of the Convention with respect to that portion of such claims which does not exceed 100,000 SDRs, except that such waiver is limited to the amounts shown below for the routes indicated, as may be authorised by governments concerned with the transportation involved.

3. Neither the waiver of limits nor the waiver of defences shall be applicable in respect of claims made by public social insurance or similar bodies whether for indemnity or contribution or acquired by way of subrogation or assignment. Such claims shall be subject to the limit in Article 22(1) and to the defences under Article 20(1) of the Convention. The carrier will compensate the passenger or dependents of the passenger for recoverable compensatory damages in excess of payments received from any public social insurance or similar body.

*** Defined if necessary**

WP 8.

(Pending)

WP 9.

(Pending)

LLOYD'S
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CONTENTS

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Warsaw Convention

The European Proposal on Compensation for Airline Passenger Death and Injury - Bold, Imaginative and Flawed

BY
Harold Caplan

1. introduction

ON 20 DECEMBER, 1995 the Commission of the European Communities' released its plans for a legisiative missile which, if ultimately approved by the Council of Ministers[2], will radically alter the law in all 15 Member States for all Community air carriers[3]. No subsequent ratification or implementation by individual States would be necessary.

Clearly the Commission is not prepared to await voluntary action by airlines in response to the IATA intercarrier "umbrella accord"[4] or subsequent implementing agreements.

Shorn of its Explanatory Memorandum and supporting material, the provisional text of the Commission's Proposal for a Council Regulation is appended to this article [the text is subject to editing before official publication].

The main aims of the Proposal are:

- to remove all statutory and contractual limits of liability for passenger death and injury in Member States for Community air carriers — both in -international transportation and in non-Convention situations such as wholly-domestic transportation.
- to remove the defense of unavoidable accident[5] for damages up to ECU 100,000 (currently valued at about US $125,000).
- to require prompt, non-refundable, cash advances up to ECU 50,000 (for injuries)

and ECU 50,000 in all death cases.

- to allow claimants to sue a Community air carrier in a Member State where the passenger was domiciled or permanently resident — in *addition to* the jurisdictions provided by Article 28[6] of the Warsaw Convention.
- to require all carriers (including non-Community carriers) to inform passengen about liability conditions.

2. Legislative Powers

Europe is not a unitary or federal state. Controversy rages over whether it should be. Meanwhile, it is a "'European Union" — "founded on the European Communities[7]".

The Union and its institutions are *sui generis:* there are no neat parallels anywhere else on the planet. "Checks and balances" exist — but they are continental European in concept and operation — owing nothing to other principles or traditions. Primary legislation, i.e., the constituent Treaties are created by unanimous consent of the Member States, but secondary legislation has diverse forms and labyrinthine procedures. This particular Proposal of the Commission is for a Council Regulation which, when passed, will act directly as part of the law of each Member State — unlike a Council Directive which is addressed to each Member State for individual national implementation.

Secondary legislation must be consistent with the constituent Treaties and their purposes as interpreted and applied by the Court of Justice and must be evolved in strict accordance with the procedures laid down for each type of legislation The Commission is the professional power-house of Europe: alone, it initiates most legislation and shepherds it to a conclusion; it has delegated legislative powers; and controls virtually all the apparatus of implementation, including the monitoring of implementation by Member States.

The preamble of the present Proposal refers to Article 84 (2)[8] of the Treaty establishing the European Community and states that the Council will act on the Commission's Proposal "In cooperation with the European Parliament" and "Having regard to the opinion of the Economic and Social Committee".

Article 84(2) is the tailpiece to **Title IV Transport** allowing the Council to determine the appropriate procedures for measures relating to sea and air transport. In this case, the procedure chosen involves the Council acting by a qualified majority: i.e., votes weighted in accordance with the following table:

	No. of Votes
Gem-my, France, Italy, UK	10 each
Spain	8
Belgium, Greece, Netherlands, Portugal	5 each
Austria, Sweden	4 each
Denmark, Ireland, Finland	3 each
Luxembourg	2

On this basis, 62 votes in favour will be required in the Council.

As will be seen from the preamble, this Proposal is submitted as an extension of the developing Community policy on the internal aviation market. In the Explanatory Memorandum (not reproduced here), it is argued that the potential diversity of liability limits and conditions "risks fragmentation of the internal aviation market". This is hardly convincing as the Memorandum also discloses that even with a removal of limits, it was estimated that insurance premium "would comprise about 0.1% to 0.35% of total operating costs". It may therefore be significant that risks of market fragmentation are not cited in the preamble:

> Council Regulations . . . . have created an internal aviation market wherein it is appropriate that the rules on the nature and limitation of liability should be harmonized.

The point is that the best justification for this Proposal can be articulated solely in terms of Consumer Protection, and that on this basis, it might be difficult to limit action to air travellen. There would be an equal case for removing limits of liability in the Berne Convention of 1961 on Carriage by Rail; the Athens Convention of 1974 on Carriage by Sea; and the Paris Convention of 1962 on the liability of Hotel Keepers. All three of these Conventions plus the Warsaw Convention were cited in preamble to an earlier measure, enacted in the interests of consumers [Council Directive 90/314/EEC - 13 June 1990 - relating to the duties and liabilities of those who sell package holidays or package tours].

This leads to another issue which may be debated in the legislative process: why a Regulation rather than a Directive? The Commission itself admits that either would produce "homogenous and effective protection of the air users". A Regulation certainly avoids "divergent national measures" and is thus a neater solution. But some of the most

recent and effective consumer protection measures have all been in the form of Directives - presumably for good reasons.[9] Speed and uniformity of results may well be the deciding factors in favor of a Regulation.

But in truth, none of the above doubts or difficulties is likely to impede the legislative process. If, as expected, Member States perceive that the Proposal, on balance, is a "good thing" - goodwill and pragmatism will combine to secure a safe passage through the complex procedures involved in translating a Commission Proposal into a Council Regulation." Nevertheless, detailed amendments may well be necessary or desirable (see Part 4 below).

3. The Proposal Background

The European Proposal did not arrive overnight.

The Transport Directorate of the Commission, which has laboured mightily to evolve and coordinate a coherent policy on air transport, had been concerned in the 1980's about passenger compensation. To this end, a series of independent reports were ordered" - leading to a consultation Paper in October 1992 : "Passenger liability in aircraft accidents - Warsaw Convention and Internal Market equivalents."[12] This stimulated parallel activity in the 33-nation European Civil Aviation Conference (of Directors-General of civil aviation). The Commission's studies led to a recommendation for an increase of limits to the level of 500,000 SDR (ECU 600,000) while the ECAC task force favoured a limit of 250,000 SDR plus several claim settlement measures.

In the same time frame, efforts were continuing in the United States to ratify Montreal Protocols 3 and 4 with a statutory Supplemental Compensation Plan; Japanese carriers waived Warsaw limits for passenger death and injury November 20, 1992[13]; and IATA sought permission from the European Competition Directorate (DG IV) and from the U.S. Department of Transportation (DOT) for members to discuss increases in the liability limits.

As is well-known, IATA's efforts culminated in a historic "umbrella accord" at its Annual General Meeting at the end of October 1995 whereby subscribing carriers undertook to take action to waive the Warsaw limits for passenger death and injury with a series of options relating to the law of the passenger's domicile plus general, or limited, waivers of defenses.[14]

The European proposal stands on its own merits, but is best seen as the first legislative response and support for the IATA initiative: it is no mere copy.

4. The Proposal (Based on the Provisional Text)

Apart from wording differences, the most striking difference between the IATA "umbrella accord' and the European Proposal is the European aim to remove *domestic* as well as international limits for passenger death and injury. The Warsaw Convention was born in Europe, and most European States have modelled their domestic air transport liability laws on the Convention - complete with limits of liability. To this extent Europe displays a great deal of uniformity - even "Special Contract" limits tend to be the same at the level of 100,000 SDR minimum - largely as a result of the influence of an informal group of aviation lawyers in the European governments. (The "Malta Group").

Thus Article 3.1 of the proposal adopts the admirably simple approach of declaring that the liability of a Community air carrier "shall not be subject to any statutory or contractual limits."

However, this may be too simple and too sweeping in its effect. Buried in the separate laws of 15 Members States there are many *statutory* limits: some are specific to air transport, others are part of the general law - e.g., limiting who is entitled to claim; limiting or excluding particular types of claim or damages; prescribing statutory deductions. Are all these statutory limits to be swept away?

That is certainly not the intent.

The intent is clearly to remove the specific limits of liability authorized by the Warsaw Convention and by national laws for non-Warsaw situations which are based on the Convention rules. The intention is not to strike down statutory limits in general. Hence more precise language in this critical Article 3.1 is desirable. Closer affinity with the language of the IATA accord would be helpful. Such a procedure would also promote uniformity in the interpretation of Article 3.2 which uses words from the English translation of Article 20(1) of the Convention. The Proposal has to be translated into all official languages of the European Community hence a simple reference to that Article would promote greater uniformity than the use of words from just one translation of the sole authentic French text.

Article 3.2 probably represents the least con-

troversial feature of the Proposal - removing the defense of unavoidable accident" for damages up to ECU 100,000 (approximately US $125,000).

The principle of such a limited waiver was accepted by airlines in 1966 in the Montreal Agreement. (CAR 18,900) in which carriers agreed to waive the defense up to US $75,000 (including lawyer's fees) or US $58,000 (plus fees) for the benefit of passengers travelling to, from or via the USA Since that time, several airlines have applied similar limits to all their passengers. Most notably, in 1982 Japanese carriers waived the defense up to 100,000 SDR for their Warsaw passengers usually **without** the waiver.

Perhaps the most controversial feature of the Proposal is Article 4: the adoption of one of the ECAC recommendations for a prompt cash advance to victims of air accidents. Aviation insurers in Europe traditionally respond sympathetically whenever claims adjusters or claims lawyers become aware of individual circumstances of financial hardship or, for example, a need to guarantee the costs of hospital or medical treatment. Thus there is a reservoir and tradition of relevant experience — ready to take flexible advantage of the new freedom which will be provided by the waiver of Article 20(1) — to accommodate all foreseeable post-accident circumstances without the burden of a comparatively rigid obligation to make cash advances. The ECAC recommendation has not even been supported by anecdotal evidence of post-accident hardship — yet the Proposal assumes that there is a proven case for lump-sum advances regardless of need, status or circumstances.

The sum proposed, ECU 50,000 (approximately US $62,500) is not negligible — to be paid or made available in all death cases "without delay and in any event not later than 10 days after the event during which damage occurred."" As it always takes time in death cases to ascertain who is legally entitled to claim compensation — 10 days is an impossibiy short period of time — unless, perhaps, the concept of making cash "available" is intended to imply that setting aside funds in escrow would suffice.

One of the most puzzling features of the Proposal is in Article 5.1 which requires the provisions of Articles 3 and 4 to be "included in the Community air carrier's conditions of carriage." As a matter of Community law, this is simply unnecessary: the removal of limits, the limited waiver of defense and the provisions for cash advances will automatically become part of the law in each Member State if the Council approves the Regulation. The purpose is therefore obscure. It cannot simply be to provide information to passengers because that is separately specified in Article 5.2. Perhaps the intention is that the new law in Europe should apply to all passengers everywhere if they are carried by a Community air carrier. If so, it would be more straightforward to re-cast Articles 3 and 4 in form of amendments to conditions of carriage.

The intention of Article 5.3 seems to be that non-Community air carriers should inform passengers if their conditions of carriage do not provide the same benefits as the new law in Articles 3 and 4. This is similar to the latest rules in Australia. However, the language of this part of the provisional text is not a model of clarity — and would undoubtedly fail the Community's own test of "plain, intelligible language" for consumer contracts.[16] No doubt this will be improved when officially published.

Possibly the most benign feature of the Proposal is the provision of an extra jurisdiction for claimants in addition to those already provided by Article 28". Article 7 would allow plaintiffs to sue Community air carriers "before the courts of the Member State where the passenger has its [sic] domicile or permanent residence."

Unlike Article XII of the moribund Guatemala City Protocol (1971) — this additional jurisdiction does not require that the carrier should have an establishment therein — hence it will be a matter for each forum to decide whether the carrier is within the court's jurisdiction. For the majority of European-based passengers it is not easy to visualize the circumstances in which Article 7 will yield a jurisdiction additional to those provided by Article 28 of the Convention. One possible scenario might be as follows:

> A passenger domiciled in France buys a ticket in Switzerland for an itinerary which has as its true Warsaw destination a place in Egypt. The passenger is killed on a flight sector performed by a charter airline based in Denmark with no offices or sales agents in any other Member State.

Article 7 purports to give the surviving spouse the right to sue the Danish carrier in France — whereas the existing Convention would only allow a choice between Denmark, Switzerland and Egypt.

No doubt the best argument supporting Article 7 is that it is consistent with the Community con-

cepts of the harmonization of laws relevant to the internal market. But it may be questioned whether a Council Regulation on air transport is the ideal medium for legislating on such a technical topic as jurisdiction. previous Community measures aimed at consumer protection" have not ventured this far and the wisdom of nations suggest that this is more conventionally achieved by multilateral specialized treaties[19]. On this basis, a Council Regulation might be regarded as a multilateral treaty if it is achieved by a unanimous vote.

5. Topics not covered in the Proposal

There are two important topics which are not dealt with in the Proposal:

(i) The first is a feature of the laws in many European states where State and private providers of benefits may have rights of subrogation against tortfeasors generally. The benefits may be in the form of social security, pensions, workmen's compensation, medical and life insurance. In certain States employers may have a right of action for the loss of an employee's services. Some of those with rights of subrogation have a statutory priority in rights of recourse, others merely rank equally with victims' rights. Thus, the first beneficiaries of a removal of liability limits will, in many instances, not be the accident victims themselves. Historically, this has not been a problem because of the comparatively low limits of liability. In these circumstances there have been formal or informal understandings whereby accident victims have been accorded priority in the recovery of limited compensation. With the removal of limits there is no reason why all those entitled to subrogate should not do so. This scarcely seems consistent with the purpose of a consumer measure designed to improve the compensation available to accident victims. The consumer purpose could be preserved by a careful definition of those natural persons who are entitled to claim compensation. The provisional text in Article 2(d) can be easily misinterpreted as benefiting lawyers rather than claimants!

(ii) The second topic is the preservation of carriers' own rights of recourse against legally responsible parties. It would not be difficult to copy Article XIII of the 1971 Guatemala City Protocol:

> *Nothing* in *this* Convention *shall prejudice the question* whether *a person* liable *for damage in accordance with its provisions has* a *right of recourse* against *any other person.*

6. Conclusion

To the extent that the European proposal seeks to implement the basic features of the IATA initiative it is to be welcomed as the most powerful and direct method of modernizing the Warsaw System simultaneously in 15 Member States — eliminating potential differences among individual national laws and Community air carriers.

Nevertheless it is capable of improvement.

In particular, the wisdom of *automatic* cash advances may be questioned. Instead, the experienced claims organizations in Europe should be trusted to make intelligent and sympathetic use of the new regime — in which there will be no artificial limits of liability, and each passenger will, in effect, have a personalized accident insurance policy worth up to US $125,000. Within such a system, cash advances can readily be made in response to genuine need — on a more flexible and generous basis than the proposed automatic payments.

APPENDIX

Proposal for a
COUNCIL REGULATION
on air carrier liability in case of air accidents

THE COUNCIL OF THE EUROPEAN COMMUNITIES

Having regard to the Treaty establishing the European Community, and in particular Article 84 (2) thereof,

Having regard to the proposal from the Commission,

in cooperation with the European Parliament,

Having regard to the opinion of the Economic and Social Committee,

Whereas rules on liability are governed by the Convention for the unification of Certain Rules Relating to International Carriage by Air signed at Warsaw, 12.10.29, hereafter called the Convention, or that Convention as amended at The Hague, 28.09.1955, whichever might be applicable; whereas this Convention is applied worldwide for the benefit of both passengers and air carriers and must be preserved;

Whereas the rules on the nature and limitation of liability in the event of death, wounding or any other bodily injury suffered by a passenger form pan of the terms and conditions of carriage in the

air transport contract between carrier and passenger; whereas Council Regulations (EEC) N' 2407/92, 2408/92 and 2409/92 have created an internal aviation market wherein it is appropriate that the rules on the nature and limitation of liability should be harmonized;

Whereas the limit of liability set by the Convention is too low by today's economic and social standards; whereas in consequence Member States have variously increased the liability limit thereby leading to different terms and conditions of carriage in the Community,

Whereas in addition the Warsaw Convention only applies to international transport; whereas in the internal aviation market the distinction between national and international transport has been eliminated; whereas it is therefore appropriate to have the same level and nature of liability in both national and international transport;

Whereas the present low limit of liability often leads to lengthy legal actions which damage the image of air transport;

Whereas Community action in the field of air transport should also aim at a high level of protection for the interests of the users;

Whereas in order to provide harmonized conditions of carriage in respect of liability of air carrier and further in order to ensure a high level of effective protection of air users, action, having regard to the principle of subsidiarity, can best be addressed at Community level;

Whereas it is appropriate to remove all limits of liability' in the event of death, wounding or any other bodily injury suffered by a passenger;

Whereas in order to avoid that victims of unpreventable accidents remain uncovered carriers should not with respect to any claim arising out of the death, wounding or other bodily injury of a passenger within the meaning of Article 17 of the Convention avail themselves of any defense under Article (20) §1 of the Convention up to the sum of ECU 100,000;

Whereas passengers or next of kin should receive a lump sum as soon as possible in order to face immediate needs;

Whereas passengers and those entitled for compensation should benefit from legal clarity in the event of an accident, whereas they must be fully informed beforehand of the applicable rules; whereas it is necessary to avoid lengthy litigation or claims process; whereas it is appropriate in addition to give the passenger the possibility of taking action in the courts of the member State in which such passenger has his domicile or permanent residence;

Whereas it is desirable in order to avoid distortion of competition that third country's carriers adequately inform passengers of their conditions of carriage;

Whereas the improvement of the situation for luggage and cargo is currently taken care of at ICAO level and does not require to be dealt with the same urgency than the passengers situation;

Whereas it is appropriate and necessary that the values expressed in this Regulation are increased in accordance with economic developments; whereas it is appropriate to empower the Commission, after consultation of an advisory Committee, to decide upon such increases;

HAS ADOPTED THIS REGULATION:

Article 1

This Regulation defines the obligations of Community air carriers to cover liability in case of accidents with respect to passengers.

Article 2

For the purpose of this Regulation;

(a) unless otherwise stated terms contained in the Regulation are as referred to in the Warsaw Convention;

(b) "air carrier" means an air transport undertaking with a valid operating license;

(c) "Community air carrier" means an air transport undertaking in the sense of Council Regulation (EEC) N' 2407/92;

(d) "persons entitled to compensation" means the victims and/or persons, who in the light of the applicable law, are entitled to represent the victims in accordance with a legal provision, a court decision or in accordance with a special contract;

(e) 'lump sum" means an advance payment to the person entitled to compensation to enable him to meet his most urgent needs, without prejudice to the speediest settlement of full compensation;

(f) "ECU" means the ECU adopted in drawing up the general budget of the European Communities in accordance with articles 207 and 209 of the Treaty.

(g) "Warsaw Convention" means the Convention for the Unification of certain Rules relating to International Carriage by Air, signed in Warsaw on 12 October 1929, together with all international instruments which build on and are associated with it;

Article 3

1. The liability of a Community air carrier for damages sustained in the event of the death,

wounding or any other bodily injury suffered by a passenger shall not be subject to any statutory or contractual limits.

2. For any damages up to the sum of ECU 100,000 the Community air carrier shah not exclude or limit his liability by proving that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures.

Article 4

1. The carrier shah without delay and in any event not later than ten days after the event during which the damage occurred pay to or make available for the person entitled to compensation a lump sum of up to ECU 50,000 in proportion to the injury sustained and in any event a sum of ECU 50,000 in case of death.

2. The lump sum may be offset against any subsequent sum to be paid in respect of the liability of the Community air carrier, but is not returnable under any circumstances.

Article 5

1. The requirements referred in Article 3 and 4 shall be included in the Community air carrier's conditions of carriage.

2. Adequate information on the requirements referred to in articles 3 and 4 shall on request be given to passengers at the Community carrier's agencies, travel agencies, check-in counters and a summary of these requirements shall be made on the ticket document.

3. Air carriers established outside the Community and not subject to the obligations referred to in articles 3 and 4 shall expressly and clearly inform the passengers thereof, at the time of purchase of the ticket at the carrier's agencies, travel agencies, or check-in counters located in the territory of a Member State. Air carriers shall on request provide the passengers with a form setting out their conditions. The fact that the limit is indicated on the ticket document does not constitute sufficient information.

Article 6

Once a year Member States authorities shall notify the list of third country air carriers not subject to the rules of this Regulation to the Air Transport User Organizations concerned and to the Commission, which shall make them available to the other Member States.

Article 7

Persons entitled to compensation in the case of air accidents involving Community air carriers, may in addition to the possibilities given by Article 28 of the Warsaw Convention bring action for liability before the courts of the Member State where the passenger has its domicile or permanent residence.

Article 8

The Commission may, after consulting the advisory Committee established according to article 9, decide to increase as appropriate the values referred to in articles 3 and 4 if economic developments indicate the necessity of such a decision. Such decision shall be published in the *Official* Journal *of* the *European Communities.*

Article 9

1. The Commission shall be assisted by an Advisory Committee composed of the representatives of the Member States and chaired by the representative of the Commission.

2. The committee shall be consulted by the Commission on a draft of the measures to be taken on the application of Article 8. The committee shall deliver its opinion within one month. The Commission shall take the utmost account of the opinion delivered by the committee. It shall inform the committee of the manner in which its opinion has been taken into account.

3. Furthermore, the Committee may be consulted by the Commission on any other question concerning the application of the Regulation.

4. The Committee shall draw up its rules of procedure.

Article 10

This Regulation shall enter into force six months after the date of its publication in the *Official Journal of the European Communities.*

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Notes

1. The European Coal & Steel Community (established 1951); The European Atomic Energy Community; and the European Economic Community (the last two were established in 1957).

2. Not to be confused with the European Council which has no formal legislative role. The European Council is formed by heads of States or governments Plus the President of the Commission: its main role is to provide political leadership.' Although the Council of Ministers is, in theory, a single body — it is in practice a number of Councils separated according to subject-matter (such as Environment, Industry, Transport, Consumers, etc.) and composed of the relevant Ministers for each subject drawn from Member States.

3. "Community air carrier" in the proposal "means an air transport undertaking in the sense of Council Regulation (EEC) No. 2407/92".

4. See 14 LAL, No. 21 (Nov. 1, 1995).

5. Article 20(1): 'The carrier is not liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures."

6. Article 28(1) [British translation]: "An action for damages must be brought, at the option of the plaintiff in the territory of one of the High Contracting Patties, either before the court of the domicile of the carrier or of his principal place of business, or where he has a place of business through which the contract has been made, or before the court at the place of destination." [Part I, First Schedule to the UK Carriage by Air Act 1961].

7. Article A of the Treaty on European Union (Maastricht, 7th February 1992). The European Economic Community was renamed the European Community [Article G. A(l)].

8. Article 84(2): 'The Council may, acting by a qualified majority, decide whether, to what extent and by what procedure appropriate provisions may be laid down for sea and air transport."

9. E.g. the Directive on package tours and holidays - noted above. Also: Council Directive son Products Liability [85/374/EEC 25 July 1985] and Unfair Terms in Consumer Contracts [93/13/EEC 5 April 19931.

10. See 'The Legislative Process in the European Community" by Philip Raworth [KLUWER 1993].

11. "La responsibility du transporteur aérien à l'ègard des passagen et des expediteurs de marchandises" by Prof. J. Naveau [June/September 1989]. "Possibilities of Community action to harmonize limits of passenger liability and increase the amounts of compensation for international accidents victims in air transport" by Sven Brise (15 Sept. 1991).

12. Transport Directorate reference: DG VII.C.1-174/92-8.

13. See Koichi Abe, Vice President, Legal Affairs, Japan Airlines, 12 LAL, No. 12 (June 15, 1993).

14. See note 4 above.

15. See note 5 above.

16. Article 5: Council Directive 90/314/EEC 13 June 1990.

17. See note 6 above.

18. See note 9 above.

19. Such as the Warsaw Convention; or the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters; or the parallel Lugano Convention (1989).

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IATA LEGAL ADVISORY SUBCOMMITTEE ON PASSENGER LIABILITY

Montreal, 3 April 1996

Supplementary Documentation Distributed at the Meeting

WP 8

The ATA Draft Attempts to Reconcile Concerns of International Carriers and U.S. Domestic Political Concerns

- ATA has developed a compromise draft implementing agreement and special contract. It is designed *to* respond to the serious concerns raised by international carriers while addressing U.S. domestic political concerns.

- The draft meets the requirements of the IIA. It includes draft IATA language to waive the limit of liability. It does not, however, attempt to satisfy all of the DOT guidelines. For example, it preserves Article 20 defenses above 100,000 SDR. Nevertheless, the ATA believes that the draft will be considered acceptable by the U.S. government. A significant feature of the compromise draft is that it permits claimants to bring cases before the courts where they are domiciled.

- In the United States, an important concern with the operation of the Warsaw system is whether victims of air disasters and their families are able to have their cases heard before courts of their own nationality so that their compensation can be determined consistent with their national expectations. This concern has been raised repeatedly in political debate on the operation of the Warsaw Convention, including hearings before the Senate Foreign Relations Committee.

- These concerns lie behind DOT's February 1995 guideline that all U.S. nationals traveling abroad should have access to U.S. courts. In the face of the strong concerns that are likely to be raised by family groups and legislators on their behalf, DOT cannot be expected to approve an agreement that fails to address this concern adequately.

- Article 28(1) of the Warsaw Convention permits a claimant to bring an action for damages in one of the following four places:

  (1) The carrier's domicile;

  (2) The carrier's principal place of business;

  (3) The place of business through which the contract has been made; or

  (4) The place of destination.

- Under subparagraph 5 of the draft special contract, the passenger and carrier would agree to consider the contract of carriage to have been made through the carrier's "place of business" in the territory of the passenger's domicile. This provision is generally consistent with the approach of the proposed E.U. regulation.

- Under Article 28 of the Convention, this would permit the claimant to bring an action in a court in his or her domicile. The compromise would permit claimants to bring an action in courts of the passenger's domicile. In effect, it would add the practical equivalent of a "fifth basis of jurisdiction" under Article 28. It does not quite go as far as DOT had hoped in that it would not cover all U.S. nationals traveling abroad, but ATA is of the view that it will be acceptable to DOT. In her March 12, 1996 letter, Ms. McFadden, DOT General Counsel states unequivocally that the fifth basis of jurisdiction must be retained.

- The draft implementing agreement is attached. In addition to the essential elements implementing the IIA, the agreement addresses other matters, including the notice required 'by the Convention. These provisions will be required in any filing with DOT to replace the Montreal Agreement.

- Also attached is a legal analysis of the fifth basis of jurisdiction prepared by Warren Dean (in consultation with Professor Bin Cheng) and presented to the 30th Annual SMU Air Law Symposium in February 1996.

AGREEMENT IMPLEMENTING THE IATA INTERCARRIER AGREEMENT
(Draft Implementation)

Pursuant to the IATA Intercarrier Agreement of 3 1 October 1995, each of the undersigned carriers ("the Carriers") shall, on or before November 1, 1996, include the following in its conditions of carriage, including tariffs embodying conditions of carriage filed by it with any government:

I. The Carrier agrees in accordance with Article 22(1) of The Convention for the Unification of Certain Rules Relating to International Transportation by Air signed at Warsaw October 12, 1929, [as amended by the Protocol done at The Hague on 28 September 1955]* ("the Convention") that, as to all international [carriage] * transportation hereunder as defined in the Convention:

(1) The Carrier shall not invoke the limitation of liability in Article 22(1) of the Convention as to any claim for compensatory damages arising under Article 17 of the Convention.

(2) The Carrier agrees that, subject to applicable law, recoverable compensatory damages for such claims may be determined by reference to the law of the domicile or permanent residence of the passenger.

(3) The Carrier shall not avail itself of any defenses under Article 20(1) of the Convention with respect to that portion of such claim that does not exceed 100,000 SDRs. * *

(4) Except as otherwise provided in paragraphs 1 and 3 hereof, the Carrier reserves all defenses available under the Convention to such claims. With respect to third parties, the Carrier reserves all right of recourse against any other person, including without limitation rights of contribution and indemnity.

(5) For the purposes of Article 28 of the Convention and in addition to any other place specified in that Article, the contract of international [carriage]* transportation shall be considered to have been made through the Carrier's place of business, if any, in the territory of the domicile or (if applicable) permanent residence of the passenger.

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* Language to be used by Carriers certificated in jurisdictions where The Hague Protocol is in force.

** Special Drawing Rights.

II. **Each Carrier shall, at the time of delivery of the ticket, furnish to each passenger whose transportation is governed by the Convention, the following notice:**

"ADVICE TO INTERNATIONAL PASSENGERS ON CARRIER LIABILITY

Passengers on a journey involving an ultimate destination or a stop in a country other than the country of departure are advised that a treaty known as the Warsaw Convention may apply to the entire journey, including any portion thereof entirely within a country. For such passengers, the Warsaw Convention and special contracts of carriage embodied in applicable tariffs may govern the liability of the Carrier for death of or injury to passengers. The names of Carriers party to such special contracts are available at all ticket office's of such Carriers and may be examined upon request."

III. **The effectiveness of this Agreement shall terminate the Carrier's participation in, and adherence to, the intercarrier agreement, approved by CAB Order E-23680 and dated May 13, 1966, relating to the liability limits of the Convention for the Unification of Certain Rules Relating to International Transportation by Air signed at Warsaw October 12, 1929. The Carrier shall file the special contract set forth in Paragraph I herein as a replacement for the special contract set forth in said intercarrier agreement.**

IV. **Nothing in this Agreement shall be deemed to affect the rights of the passenger, the claimant and/or the carrier under the Convention other than as set forth in Paragraph I herein.**

V. The Carrier shall encourage other carriers engaged in international [carriage]* transportation as defined in the Convention to become party to this Agreement.

VI. **This Agreement shall be filed with the U.S. Department of Transportation for approval pursuant to 49 U.S.C. sections 4 1308 and 4 1309 and filed with other governments as required. This Agreement shall become effective upon approval by that Department under 49 U.S.C. section 41309, and action by that Department to authorize adherence to this Agreement as a replacement for the intercarrier agreement referred to in paragraph III of this Agreement.**

VII. **This Agreement may be signed in any number of counterparts, all of which shall constitute one Agreement. Any carrier may become a party to this Agreement by signing a counterpart hereof and depositing it with the U.S. Department of Transportation.**

_____
(signature and title)

_____
(name of Carrier)

_____
(address of Carrier)

March 29, 1996

AGREEMENT

The undersigned carriers (hereinafter referred to as "the Carriers") hereby agree as follows:

1. Each of the Carriers shall, effective May 16, 1966, include the following in its conditions of carriage, including tariffs embodying conditions of carriage filed by it with any government:

"The Carrier shall avail itself of the limitation of liability provided in the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw October 12th, 1929, or provided in the said Convention as amended by the Protocol signed at The Hague September 28th, 1955. However, in accordance with Article 22(1) of said Convention, or said Convention as amended by said Protocol, the Carrier agrees that, as to all international transportation by the Carrier as defined in the said Convention or said Convention as amended by said Protocol, which, according to the contract of Carriage, includes a point in the United States of America as a point of origin, point of destination, or agreed stopping place

(1) The limit of liability for each passenger for death, wounding, or other bodily injury shall be the sum of US $75,000 inclusive of legal fees and costs, except that, in case of a claim brought in a State where provision is made for separate award of legal fees and costs, the limit shall be the sum of US $58,000 exclusive of legal fees and costs.

(2) The Carrier shall not, with respect to any claim arising out of the death, wounding, or other bodily injury of a passenger, avail itself of any defense under Article 20(1) of said Convention or said Convention as amended by said Protocol.

Nothing herein shall be deemed to affect the rights and liabilities of the Carrier with regard to any claims brought by, on behalf of, or in respect of any person who has willfully caused damage which resulted in death, wounding, or other bodily injury of a passenger."

2. Each Carrier shall, at the time of delivery of the ticket, furnish to each passenger whose transportation is governed by the Convention, or the Convention as amended by the Hague Protocol, and by the special contract described in paragraph 1, the following notice, which shall be printed in type at least as large as 10 point modern type and in ink contrasting with the stock on (i) each ticket; (ii) a piece of paper either placed in the ticket envelope with the ticket or attached to the ticket; or (iii) on the ticket envelope:

"ADVICE TO INTERNATIONAL PASSENGER ON LIMITATION OF LIABILITY

Passengers on a journey involving an ultimate destination or a stop in a country other than the country of origin are advised that the provisions of a treaty known as the Warsaw Convention may be applicable to the entire journey, including any portion entirely within the country of origin or destination. For such passengers on a journey to, from, or with an agreed stopping place in the United States of America, the Convention and special contracts of carriage embodied in applicable tariffs provide that the liability of
[certain]*
[(name of carrier) and certain other] carriers parties to such special contracts for death of or personal injury to passengers is limited in most cases to proven damages not to exceed US $75,000 per passenger, and that this liability up to such limit shall not depend on negligence on the part of the carrier. For such passengers traveling by a carrier not a party to such special contracts or on a journey not to, from, or having an agreed stopping place in the United States of America, liability of the carrier for death or personal injury to passengers is limited in most cases to approximately US $10,000 or US $20,000.

The names of Carriers parties to such special contracts are available at all ticket offices of such carriers and may be examined on request.

Additional protection can usually be obtained by purchasing insurance from a private company. Such insurance is not affected by any limitation of the carrier's liability under the Warsaw Convention or such special contracts of carriage. For further information please consult your airline or insurance company representative."

3. [The Agreement was filed with the Civil Aeronautics Board of the United States. The Board approved it by Order E-23680, adopted May 13, 1966. The Agreement (Agreement 18900) became effective May 16, 1966. On January 1, 1985, this Agreement became the responsibility of the Department of Transportation (DOT) by operation of law.]

4. This Agreement may be signed in any number of counterparts, all of which shall constitute one Agreement. Any Carrier may become a party to this Agreement by signing a counterpart hereof and depositing it with DOT.

5. Any Carrier party hereto may withdraw from this Agreement by giving twelve (12) months' written notice of withdrawal to DOT and the other Carriers parties to the Agreement.

* Either alternative may be used.

_____
[signature and title]

_____
[name of carrier]

_____
[address of carrier]

_____

RESTRUCTURING THE WARSAW RIGHT TO RECOVER

30th Annual SMU *Air Law Symposium*

By Warren L. Dean, Jr.[1]

Introduction Forum selection is an important element in resolving any controversy or dispute arising in international commerce. International air transportation -- which has been governed virtually since its inception by the Warsaw Convention[2] -- is no exception to thii rule. Thii convention authorizes the commencement of an action for damages for the death, wounding or other bodily injury of a passenger in a jurisdiction satisfying one or more of four specified criteria, with the choice of the forum left to the option of the plaintiff. Recent efforts to reform the operation of the Convention by increasing the compensation available to passengers necessarily requires an evaluation of the likely operation of the Convention's jurisdictional provisions in light of the changes being contemplated. This paper examines issues associated with the potential reform of the jurisdictional provisions of the Convention in light of liability reforms currently under consideration by the industry and governments.

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[1] Mr. Dean is a senior partner in the Washington law firm of Dyer Ellis & Joseph and is an Adjunct Professor of international transportation law in the graduate program of the Georgetown University Law Center. Hi course includes a comprehensive overview of the history and operation of the Warsaw Convention and he has written and lectured widely on this and other international law subjects of importance to the transportation sector. The views expressed here are solely those of the author.

The author gratefully acknowledges the invaluable counsel of Mr. Bin Cheng, Emeritus Rofessor of Air & Space Law, University of London, who was consulted in the preparation of this paper and commented upon its analysis.

[2] Convention for the Unification of Certain Rules Relating to International Transportation by Air, concluded at Warsaw October 12, 1929, 49 Stat. 3000; 2 Bevans 983; 137 L.N.T.S. 11.

Background Article 28 of the Warsaw Convention sets down four places where a plaintiff may bring an action: (1) the carrier's domicile; (2) the carrier's principal place of business; (3) the destination; or (4) the place where the contract for transportation was made. In the United States, this means that courts sometimes dismiss cases brought by U.S. citizens in U.S. courts even though the foreign carrier involved has more than the minimum *contacts* necessary under *International Shoe*[3] for assertion of U.S.-court jurisdiction. In some highly visible cases, U.S. citizens who had to bring their cases in foreign courts have been unable to receive compensation, whereas other claimants, including foreign nationals, damaged in the same disaster but having access to U.S. courts, have been paid. Several cases in foreign courts involving U.S. nationals and arising out of the KAL 007 tragedy are described in Appendix A to this paper.

Not surprisingly, questions have been raised about the fairness of forcing U.S. citizens to seek compensation in foreign courts, particularly in the case of flights to and from the United States. The U.S. Departments of State and Transportation are particularly concerned that the Warsaw Convention should not operate to the disadvantage of U.S. nationals in this manner.

The concern of the United States in this area is understandable. In cases where the Warsaw Convention precludes a passenger from bringing an action in the courts of his or her domicile, it has the effect of denying that passenger or hi or her family access to the

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[3] *International Shoe Co. v. State of Washington, et al., 326* U.S. 310, 66 S.Ct. 154 (1945).

courts and the law with which he or she is most familiar and has the greatest connection. The law of the passenger's domicile is the law around which he or she made plans before the accident, the law where the estate will be probated and where the passenger's survivors will most likely continue to live.'

It will surprise no one in this audience to hear that the fairness and adequacy of tort compensation is in large part a function of the court system. Even assuming a judicial system that is neither politicized nor corrupt, plaintiffs in foreign courts can find themselves at a disadvantage. In some places, resentment can arise from antipathy toward American standards of recovery. Where the local standard of living is very low, courts may find requests for damages in the millions of dollars to be unreasonable, or against the policy of the forum.

Concerns about being at the *mercy* of a foreign court have led some to focus on getting passengers access to their home courts. As Mr. Lee Kreindler said in a recent article, "[f]requently venue is more imponant in determining damages than the substantive law applied."[5]

Governments have attempted to address these concerns by agreeing to expand the four bases of jurisdiction under Warsaw to include the passenger's domicile. Now known as

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[4] For a full discussion of the arguments that the governing law for determining damages should be the law of the victim's domicile, *see* Mendelsohn, Allan, *A Conflicts of Laws Approach to the Warsaw Convention, 33* J. Air Law & Comm. 624 (1967).

[5] Kreindler, Lee, *The IATA Solution,* Lloyd's Aviation Law 6 (1995).

the "fifth basis of jurisdiction," this reform was included in the 1971 Guatemala Protocol and subsequently incorporated in the 1975 Montreal Additional protocol No. 3. However, there appears to be little chance that those protocols will ever be ratified.

Proposed Reforms to the Operation of the Warsaw System The international airline industry has been examining ways to modify the Warsaw regime to assure passengers full and fair recovery, without awaiting the uncertain outcome of the long governmental process. At the annual general meeting of the International Air Transport Association in October 1995, the industry endorsed a proposed agreement, known as the IIA, to take action to waive Warsaw's liability limits 'so that recoverable compensatory damages may be determined and awarded by reference to the law of the domicile of the passenger."[6] If the law of the passenger's domicile is to govern the amount and kind of damages, the courts of that country are best able to apply that law. In a foreign court, the law of damages applied by the courts in the country of the passenger's domicile would have to be proven if it is to be applied at all.[7] In fact, few foreign countries apply foreign law in their courts. In the United States, where foreign law may be applied under choice of law

[6] IATA Intercarrier Agreement on Passenger Liability ¶ 1, October 30, 1995 (hereafter "IIA"). The text of the IIA and the accompanying explanatory note are in Appendix B.

[7] In U.S. federal courts, the court's determination of foreign law is treated as a ruling on a question of law. To determine foreign law, federal courts may conduct their own investigations or require the parties to give a complete presentation. F.R.C.P. Rule 44.1.

rules, courts have dismissed cases arising in non-Warsaw contexts where foreign law was not proved. [8]

One commenter, Bin Cheng, has suggested that the airlines could add the passenger's domicile as a fifth basis of jurisdiction simply by adding a clause to theii conditions of carriage that would deem the contract to have been made by or through a place of business in the passenger's country of domicile.[9] Essentially, the airlines would agree to treat a contract for air transportation as if it had been made through the carrier's place of business in the territory of the passenger's domicile. For example, the following language could be used in the carrier's conditions of carriage:

> The contract of international transportation shall be considered to have been made through the carrier's place of business, if any, in the territory of the passenger's domicile or permanent residence.

This will have the effect of making the court of the passenger's country of domicile or permanent residence one of the competent jurisdictions under Article 28 of the Warsaw Convention.

In this regard, the Council of the European Commission has proposed a regulation to reform the operation of the Convention for Community carriers. In addition to requiring a waiver of liability limits, it would require Community air carriers to permit persons to

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[8] *Walton v. Arabian American Oil Co., 233* F.2d 541 (2d Cit. *19561, cert. denied,* 352 U.S. 872 (1956) (dismissing a personal injury action arising from an automobile accident between a U.S. citizen and a U.S. corporation that occurred in Saudi Arabia).

[9] Bin Cheng, *A Fifth Jurisdiction without Montreal Additional Protocol No. 3, and Full Compensation without the Supplemental Compensation plan,* 20 Air & Space L. 118 (1995).

bring actions for damages before the courts of the Member State where the passenger has its domicile or permanent residence, in addition to the other options available under Article 28 of the Convention. [10] The Explanatory Memorandum accompanying the proposal explains this feature as follows:

> - Passengers should have the choice of the jurisdiction before which they want to bring action. It should include the possibility to bring action before the court of the Member State where the passenger has its domicile. This might circumvent the possibilities of confusion that might arise when referring to the law of the domicile."

If the airlines can implement this proposal, it would go a long way toward meeting an explicit U.S. government goal as well: assuring U.S. passengers of full and fair recovery for losses sustained in international air operations. In its order granting antitrust immunity to airline discussions regarding improvements to the airline liability regime, the Department of Transportation set down as a guideline that any intercarrier agreement should cover all U.S. nationals, regardless of where they were traveling. [12] The proposal would not cover every situation involving a U.S. national but, if implemented systemwide by major international carriers, it should cover most situations. [13]

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[10] Art. 7 of the proposed regulation provides: "Persons entitled to compensation in the case of air accidents involving Community air carriers, may in addition to the possibilities given by article 28 of the Warsaw Convention bring action for liability before the courts of the Member State where the passenger has its domicile or permanent residence."

[11] Proposed Council Regulation, Art. 7 (Dec. 20, 1995).

[12] DOT Order 95-2-44 at 3 (February 22, 1995).

[13] For example, U.S. nationals traveling between points wholly outside the United States on carriers not party to the intercarrier agreement would not be covered.

Bin Cheng's contractual fii basis of jurisdiction proposal, however, is not the only way of addressing government concerns with respect to those situations where a passenger purchases a ticket outside of hi or her domicile and hence is prevented by the Convention from bringing an action there. There have been proposals, for example, to submit these cases to binding arbitration by giving the claimant the right to make a post-accident election to invoke such a procedure. Nevertheless, the contractual fifth basis of jurisdiction, if it is lawful, may be the least costly and most efficient option. For the vast majority of accidents, it would not have the effect of creating litigation in additional jurisdictions. Rather, it would simply allow passengers to move their case from one pending action to the other. The arbiion proposal, on the other hand, would create an additional forum in which the carrier would have to panicipate.

Nevertheless, the concern has been expressed that the contractual fifth basis of jurisdiction would impose additional costs upon carriers by authorizing litigation in the United States where none might otherwise exist. This is extremely unlikely. In a crash involving third, fourth, or fifth freedom services involving the United States, there will be hundreds of cases filed there, and the proposal would simply mean that a few additional U.S. domiciliaries would be able to join a consolidated action pending in the United States. Even in the case of transportation not involving the United States, in all likelihood there will be at least a few U.S. ticketed passengers with claims pending in the United States. In the case of the 1992 crash of Thai Airways International flight 311 from Bangkok to Kathmandu, for example, four cases were brought on behalf of seven decedents in the United States District Court for the Northern District of California, which entered a finding

of wilful misconduct.[14] Many of the decedents were foreign residents who happened to purchase their tickets in the United States. Allowing, for example, U.S. domiciliaries with tickets purchased abroad to join this consolidated action in California would not have presented a significant additional burden on carriers, and would appear to be consistent with judicial efficiency. It would avoid, for example, the problems of U.S. domiciliaries seeking to assert U.S. measures of damages in cases filed abroad, as contemplated by the language of the IIA itself. In sum, from nearly every perspective, the contractual fifth basis of jurisdiction has much to commend it. The question is, therefore, whether it is lawful.

The proposal presents interesting U.S. domestic and international legal questions. First, Article 32 bars pre-accident alteration of the jurisdictional rules. It states:

> Any clause contained in the contract and all special agreements entered into before the damage occurred by which the parties purpon to infringe the rules laid down by this convention, whether by deciding the law to be applied, or by altering the rules as to jurisdiction, shall be null and void.

Therefore, this paper addresses the following two questions: (1) Would the addition of the new forum provision in a special contract between the carrier and the passenger violate Article 32 of the Convention? (2) Will United States courts as a matter of domestic law permit the inclusion of a forum selection clause as part of a passenger's ticket?

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[14] *Koirala* et *al.* v. *Thai Airways,* 1996 U.S. Dii. Lexis 1024 (N.D. Calif. 1996).

The Warsaw Convention. Turning to the first issue, a forum selection clause in a special contract is generally consistent with the operation of international law. Moreover, it would promote efficiency in resolving disputes between carriers and passengers.

In effect, the carrier and the passenger would agree that, under certain circumstances, they will treat a contract as having been made in the country where the passenger is domiciled so to allow the passenger to take advantage of Article 28(1) of the Warsaw Convention.

First, Article 33 permits carriers to take actions that do not conflict with the Warsaw Convention. It says: "[n]othing contained in this convention shall prevent the carrier either from refusing to enter into any contract of transportation or from making regulations which do not conflict with the provisions of this convention." Under accepted principles, regulations set down in a tariff are actually an offer to enter into a contract with a passenger or shipper under the terms of the regulations. Government approval makes those regulations enforceable, in effect according to contractual terms the force of law.[15] Therefore, the carrier and the passenger, with government approval, are specifying an important contractual term that is subject to their mutual agreement -- the place where the contract is to be considered made -- by regulation incorporated 'in the carrier's applicable tariffs. 'This is certainly not a novel concept in air transportation. Since the special contract would not conflict with the Convention, Article 33 would permit it.

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[15] Tariffs, once filed with and approved by the Depanment of Transportation, have the force and effect of law. See discussion, *infra*, at 18.

Second, although private international law has yet to be codified, forum selection clauses in contracts between private parties are generally valid under the principle of party autonomy.[16] Jurisdictions sometimes limit their use, especially if they do not appear fair or reasonable.

In the U.S., the Supreme Court has ruled in The *Bremen* case that forum selection clauses are valid unless they are unreasonable under the circumstances." English courts have likewise enforced forum selection clauses in general.[18] The 1968 European Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters requires

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[16] See Francis A. Gabor, *Reflections on the International Unification of Sales Law: Stepchild of the New Lex Mercatoria: Private International Law from the United States Perspective,* 8 NW. J. Int'l L. & Bus. 538, 546 (1988) ("forum selection or prorogation clauses and arbitration clauses are almost universally recognized by the world trading nations") (footnotes omitted).

[17] *M/S Bremen v. Zapata Off-Shore* Co., 407 U.S. 1, 10-13 (1972) ("forum clause should control absent a strong showing that it should be set aside"). See *Scherk v. Alberto-Culver* Co., 417 U.S. 506, 516-l 9 (1974) (agreement to arbitrate is a specialized forum selection clause that should be enforced); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,* 473 U.S. 614, 631 (1985) (in upholding an arbiion clause, the Court noted that "The Bremen and Scherk establish a strong presumption in favor of enforcement of freely negotiated contractual choice-of-forum provisions"); *Carnival Cruise Lines, Inc.* v. *Shute,* 499 U.S. 585 (1991) (forum selection clause in cruise line's passenger ticket was enforceable). See *a/so* Restatement (Second) of Conflict of Laws § 80 (1971) ("The parties' agreement as to the place of the action cannot oust a state of judicial jurisdiction, but such an agreement will be given effect unless it is unfair or unreasonable."); Restatement (Third) of the Foreign Relations Law of the United States § 42 1 reporters note 6 (1986).

[18] *See, e.g., Unterweser Reederei G.m.b.H. v. Zapata Off-Shore Co. (The Chaparral),* [1968] *2* Lloyd's Rep. *158* (C.A.); *Mackender v. Feldia A.G.,* 119661 2 Lloyd's Rep. 449 (C.A.); *The Eleftheria,* [1969] 1 Lloyd's Rep. *237* (P.). *See also* I *Chitty on Contracts* ¶¶ 30-004,-005, -008, -025 (27th ed. 1994).

deference to forum selection clauses that choose the forum of a contracting state." The Convention on the Recognition and Enforcement of Foreign Arbiial Awards[20] and the Inter-American Convention on International Commercial Arbitration[21] also recognize the validity of contractual forum selection clauses. Both treaties require the contracting states to accept written agreements between private parties to arbiiate disputes.

Thus, a special contract that embraced a fifth basis of jurisdiction would be valid unless one of the exceptions generally recognized under private international law applies. The U.S. Supreme Court's opinion in the *Bremen* case illustrates typical concerns with enforcing a forum selection clause. There, the Court held that "a freely negotiated private international agreement, unaffected by fraud, undue influence, or overweening bargaining power. . . should be given full effect?

To be sure, the fifth jurisdiction special contract, unlike the contract in the *Bremen* case, would appear in a form contract that was not the subject of a freely negotiated international agreement. However, it would operate only to benefit the party having less

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[19] Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Sept. 27, 1968, art. 17, 15 J.O. Comm. Eur. (No. 299) 32 (1972). *See* Brian Pearce, The *Comity Doctrine as a Barrier to Judicial Jurisdiction: A U.S.-E.U. Comparison, 30* Stan. J. Int'l L. 525, 54446 (1994) (Belgium, Denmark, France, and Germany generally uphold the enforceability of forum selection clauses).

[20] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, art. II, 21 U.S.T. 2517, T.I.A.S. 6997, 330 U.N.T.S. 3.

[21] Inter-American Convention on International Commercial Arbitration, Jan. 30, 1975, art. 1, ___ U.S.T. ___, T.I.A.S. ____, 14 I.L.M. 336.

[22] *The Bremen, 407* U.S. at 12- 13.

bargaining power by giving that party an additional jurisdictional option.[23] In addition, the contract itself would be subject to both government review and approval. Under these circumstances, I cannot imagine that the absence of arms' length bargaining would even be a factor.

In *Bremen,* the Court also considered whether enforcement of the forum selection clause would be unreasonable or unjust.[24] Here the selected forum would clearly bear a reasonable relationship to the parties -- it is the domicile of one of the parties and it is a place of business of the other party. The ability of parties to the contract to foresee the potential jurisdictions in which an action may be brought was a factor in drafting Article 28. The delegates to the conference rejected the place of accident because the parties could not foresee the jurisdictions in which they might be called on to litigate.[25] Here, the very fact that the carrier maintains a place of business indicates that it can foresee that it might be called on to litigate there.

Furthermore, the addition of the fifth basis of jurisdiction would be consistent with a primary purpose of the Warsaw Convention -- to establish uniformity in the rules governing air travel. The suggested special contract would not conflict with that goal. It would not affect any potentially applicable liability limits (which will be waived under

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[23] *See Carnival Cruise Lines, Inc.* v. *Shute, 499* U.S. at 593-95 (holding that the inclusion of a reasonable forum selection clause in a form passage contract may be permissible despite the lack of bargaining by the parties).

[24] *The Bremen, 407* U.S. at 15.

[25] A. Lowenfeld, Aviation Law 7-49, § 2.5 note b (2nd ed. 1981).

the IIA), and the rules would still be uniform if adopted by all carriers systemwide. Nor is it likely that the special contract could ever be deemed unfair or unjust, especially when it would merely permit passengers to litigate disputes in their own domicile, where the carrier already maintains a place of business. Such an arrangement balances the rights of the carriers and the passengers, and promotes efficiency in resolving disputes.[26]

The contractual provision under consideration is similar to a right granted to passengers aboard vessels under the Athens Convention Relating to the Carriage of Passengers and Their Luggage by Sea, which would permit a claimant under the treaty to bring an action in "a court of the State of the domicile or permanent residence of the claimant, if the defendant has a place of business and is subject to jurisdiction in that State."[27]

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[26] It is difficult to conceive of circumstances where the validity of the contract would be made an issue. Since it provides passengers with another option and thus works clearly to their benefit, they obviously would not be the ones to complain. And since the carrier voluntarily adopted the provision, it would not be in a position to complain.

[27] Athens Convention Relating to the Carriage of Passengers and Their Luggage by Sea, Dec. 13, 1974, art. 17(1), 14 I.L.M. 945 (not in force), which provides as follows:

> An action arising under thii Convention shall, at the option of the claimant, be brought before one of the courts listed below, provided that the court is located in a State Party to this Convention:
>
> (a) the court of the place of permanent residence or principal place of business of the defendant, or
>
> (b) the court of the place of departure or that of the destination according to the contract of carriage, or
>
> (c) a court of the State of the domicile or permanent residence of the claimant, if the defendant has a place of business and is subject to jurisdiction in that State, or
>
> (d) a court of the State where the contract of carriage was made, if the defendant has a place of business and is subject to jurisdiction in that State.

(continued...)

Thus, since the suggested special contract would not deprive either the passengers or the carriers of any fundamental rights under the Warsaw Convention, it should clearly be enforceable under private international law principles.

The question remains, however, whether the special contract specifically conflicts with Article 32 of the Warsaw Convention. In hi article, Professor Cheng said that an agreement to accept a fifth basis of jurisdiction would not be void under Article 32 because the rules set forth by Article 28 would remain unchanged.[28] The special contract would merely treat a specific factual situation as falling under the Convention's rules. When viewed in the context of the purposes of the Warsaw Convention, the proposal should not be regarded as impermissible under Article 32 because it does not "infringe" the Convention's rules or 'alter" the rules concerning jurisdiction since it will promote efficiency and choice in resolving disputes between the carriers and passengers.[29] In *Lufthansa* v. CAB, the D.C. Circuit Court of Appeals held that regulations that supplement the Convention, but do not contradict the Convention's original intent or provisions, are

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[27](...continued)
See *a/so,* International Convention for the Unification of Certain Rules Relating to Carriage of Passenger Luggage by Sea, Brussels, May 27, 1967, art. 13(l)(c).

[28] Bin Cheng, *A Fifth Jurisdiction without Montreal Additional Protocol No. 3, and Full Compensation* without *the Supplemental Compensation Plan,* 20 Air & Space L. 118, 120 (1995).

[29] See Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, art. 31 (1), 1155 U.N.T.S. 331 ("A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.").

permissible.[30] The case involved a U.S. Civil Aeronautics Board requirement that carriers give passengers notice of their liability limit for baggage loss and damage. Lufthansa argued that the regulation violated Article 3 of the Convention. The court disagreed and noted that many current regulations placed on carriers are not part of the Convention and were added by IATA agreements that were approved by the CAB. The Court rejected the argument that the Convention's provisions are exclusive and held that the articles may be supplemented by additional regulations. [31]

As previously noted, the proposal would not alter the jurisdictional provisions set forth in Article 28. It merely establishes a basis for the passenger to invoke Article 28 in a specific fashion, by considering the contract to have been made through the *carrier's* place of business in the territory of the passenger's domicile. The plaintiff makes the election to invoke this option only after the accident occurs. Therefore, the parties' actions in litigating the dispute in a particular court would be tantamount to a special agreement made after the damage has occurred. In that respect, the proposal appears to be consistent with the language of both Article 28 and Article 32.[32]

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[30] *Deutsche Lufthansa Aktiengesellschaft v. C.A.B., 479* F.2d 912, 916 (D.C.Cir.1973).

[31] 479 F.2d at 917.

[32] Under Article 28 an action may be brought "at the option of the plaintiff" in one of the four mentioned places. Furthermore, it is interesting to note that Article 17(2) of the Athens Convention, *supra* note 25, explicitly permits such a result: "After the occurrence of the incident which has caused the damage, the parties may agree that the claim for damages shall be submitted to any jurisdiction or to arbitration."

Finally, Article 22 does not guarantee access to a U.S. court. Courts can apply the doctrine of forum non conveniens to dismiss a Warsaw case, even though the court has Article 28 jurisdiction. For example, in the liigation arising from the 1982 Pan American disaster near New Orleans, the Fifth Circuit held that the existence of Warsaw jurisdiction did not prevent the district court from applying the doctrine of forum non conveniens.[33]

Domestic Law Our research revealed no specific instances in which air carriers have attempted unilaterally to specify the places where individual claimants could bring an action. However, U.S. courts would in all likelihood uphold the forum selection clause since it: (1) does not violate the Convention's jurisdiction provisions; (2) will have the sanction of formal government approval; (3) does not discourage passengers from pursuing potential claims; and (4) permits passengers to have their claims heard by the most convenient forum.

The Supreme Court recently held that a cruise line could include a forum selection clause on passenger tickets.[34] The case involved a forum-limiting provision that required all disputes to be litigated in a Florida court of competent jurisdiction.= Where a forum selection clause is not the subject of negotiation, the Court held that it will be scrutinized

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[33] *In re Air Crash Disaster Near New Orleans, La.,* 821 F.2d 1147, 1159 (5th Cir. 19871, *vacated on other grounds sub nom., Pan American World Airways, Inc. v. Lopez, 490* U.S. 1032, *reinstated save as to damages under original nom., 883* F.2d 17 (5th Cii. 1989).

[34] *Carnival Cruise tines, Inc., v. Shute, 499* U.S. 585 (1991).

[35] *Id.* at 587-588.

for fundamental fairness and reasonableness. *Id.* In its review, the Court noted the potential number of fora to which an international carrier could be exposed and considered a number of factors, including the reduction in cost to the consumer "reflecting the savings that the cruise line enjoys by limiting the fora in which it may be sued."[36] The Court also found the clause reasonable because the provisions did not discourage passengers from pursuing claims and the passengers conceded that they had actual notice of the forum provision when they purchased the ticket.[37] In making its decision, the Court found that the forum selection clause did not take away a passenger's right to a trial, but only required that any action be brought in a Florida court of competent jurisdiction. [38]

Although a forum selection clause similar to the one in *Carnival* would probably violate Article 28 (since it would severely infringe the passenger's right to bring an action in certain jurisdictions), *Carnival* shows that forum selection provisions are permissible under U.S. law provided they are reasonable and fundamentally fair. Of course, the proposed special contract will have the imprimatur of the federal government agency charged with economic regulation of international air services -- the Department of Transportation. Carriers will obtain that approval first by filing with DOT the agreement for approval and antitrust immunity under 49 U.S.C. §§ 41309 and 41308, respectively. Courts will defer

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[36] *Id.* at 594.

[37] *Id.* at 593-595.

[38] *Id.* at 596.

to DOT's expertise on the fairness and reasonableness of the forum selection clause unless its approval is arbitrary and capricious.[39]

Once DOT has approved and immunized the agreement, carriers will file it in a tariff which, when permitted to go into effect, has the force of law." A carrier may not deviate from a filed and effective tariff under any pretext.• ' Thii Supreme Court has long adhered to thii concept, known es the "filed rate doctrine."[42] The filed rate doctrine applies to air transportation.[43]

Finally, the proposal is consistent with U.S. judicial interpretations of the operation of Article 28 of the Convention. For the purposes of Article 28(1), U.S. courts have held that the contract is made when "the carrier consent[s] to undertake the international transportation of the passenger from one designated spot to another, and that the

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[39] *5* U.S.C. § 706(2)(A); *Chevmn U.S.A. v. Natural Resources Defense Council, 467* U.S. 837 (1984).

[40] *Lowden v. Simonds-Shields-Lonsdale Grain Co., 306* U.S. 5 16, 520 (1939); *St. Paul Ins. Co. v. Venezuela Int'l Airways, Inc., 807* F.2d 1543, 1548 (11th Cir. 1987).

[41] 49 U.S.C. § 41510 (1995); accord, *Louisville & Nashville R. Co. v. Maxwell, 237* U.S. 94 (1915).

[42] *Keogh v. Chicago & Northwestern R.Co., 260* U.S. 156,163 (1922). The Supreme Court recently affirmed the filed rate doctrine in *Maislin Industries v. Primary Steel, 497* U.S. 116 (19901, involving the Interstate Commerce Commission's negotiated rates policy.

[43] *Tishman & Lipp, Inc. v. Delta Air tines,* 413 F.2d 1401, 1403 (2d Cir. 1969); North *Am. Phillips Corp. v. Emery Air Freight, 579* F.2d 229 (2d Cir. 1978).

passenger in turn consent[s] to the undertaking."[44] Further, they have held that the contract is made where the meeting of the minds between carrier and purchaser occurs."

The passenger ticket is not the contract of carriage; rather, the issuance of a ticket evidences the contractual relationship. *Id.* Although in most cases, the meeting of the minds will occur in the same place that the ticket is issued, the two locations need not always coincide. It would seem logical that if the passenger and carrier can vary the place of the meeting of the minds and thereby determine the place where the contract was made for purposes of Article 28(1), they can also agree on a location where they will deem the meeting of the minds to have occurred.

Conclusion I conclude that carriers can, by passenger-carrier agreement, subject themselves to the jurisdiction of the court where the passenger is domiciled, consistent with the Warsaw Convention. Such an agreement would not violate Article 32's bar against pre-accident alterations of the jurisdictional rules. Moreover, a forum selection clause, included in a carrier's tariff and approved by relevant aeronautical authorities, is entirely consistent with U.S. law and policy. In the vast majority of cases, it would impose no additional costs on the carriers, since it contemplates the reassignment of a domiciliary's claim from an action pending in one jurisdiction to an action pending in the presumably far more convenient jurisdiction of his or her domicile. It would also avoid the

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[44] *Block v. Compagnie Nationale Air France, 386* F.2d 323, 330-33 1 (5th Cir. 1967).

[45] *Boyar v. Korean Air Lines, 664* F. Supp. 1481, 1485 (D.D.C. 1987); *In re Air Disaster Near Cove Neck, New York, 774* F. Supp. 732, 734 (E.D.N.Y. 1991).

difficult problems raised by claimants seeking to import foreign measures of damages in actions against carriers. If the carriers ultimately decide to offer such a contract, it would go a long way towards meeting the objective of assuring passengers of their full and fair recovery of all compensatory damages and ensuring the continued vitality and efficiency of the Warsaw system itself.

February 28, 1996

The KAL Cases: U.S. Nationals in Foreign Courts

Sarah Draughn, Christian Munder, and Irene Steckler were three of the Americans on Korean Air Lines flight 007 when it was shot down. Sarah was a Tufts University student going to visit her parents in Tokyo on her way to a junior year in Europe. Christian lived and went to school in The Philippines. Irene and her husband lived in Japan. They all had one other thing in common: their tickets were bought in a foreign country.

Sarah's parents initially filed suit in a U.S. court, as did Irene's and Christian's. They were all dismissed under the Warsaw Convention because they could not meet any of the four jurisdictional requirements set down in Article 28 of that treaty: the United States is neither KAL's domicile nor its principal place of business, the United States was not their destination and the contract for transportation was made outside the United States.

Sarah's parents, Paul and Nancy, refiled in Japan. They have had to pay substantial court costs. The judges there have completed their investigation, but still -- 13 years later -- have not addressed the question of wilful misconduct.

Christian's ticket was bought in The Philippines. His parents, Joseph and Sonya Munder, refiled their case in that country, where contingency fees are not used in tort cases. To keep the litigation going, they have paid very substantial up-front fees and court costs. Their case is also still pending 13 years later.

Irene's parents settled the case for an amount close to the $75,000 Warsaw cap, although fair compensation for the 32-year-old language instructor's wrongful death probably would have been much higher.

INTERCARRIER AGREEMENT ON PASSENGER LIABILITY

WHEREAS: The Warsaw Convention system is of great benefit to international air transportation; and

NOTING THAT: The Convention's limits of liability, which have not been amended since 1955, are now grossly inadequate in most countries and that international airlines have previously acted together to increase them to the benefit of passengers;

The undersigned carriers agree

1. To take action to waive the limitation of liability on recoverable compensatory damages in Article 22 paragraph 1 of the Warsaw Convention* as to claims for death, wounding or other bodily injury of a passenger within the meaning of Article 17 of the Convuttion, so that recoverable compensatory damages may be determined and awarded by reference to the law of the domicile of the passenger.

2. To reserve all available defences pursuant to the provisions of the Convention; nevertheless, any carrier may waive any defence, including the waiver of any defence up to a specified monetary amount of recoverable compensatory damages, as circumstances may warrant.

3. To reserve their rights of recourse against any other person, including rights of contribution or indemnity, with respect to any sums paid by the carrier.

4. To encourage other airlines involved in the international carriage of passengers to apply the terms of this Agreement to such carriage.

5. To implement the provisions of this Agreement no later than 1 November 1996 or upon receipt of requisite government approvals, whichever is later.

6. That nothing in this Agreement shall affect the rights of the passenger or the claimant otherwise available under the Convention.

7. That this Agreement may be signed in any number of counterparts, all of which shall constitute one Agreement. Any carrier may become a party to this Agreement by signing a counterpart hereof and depositing it with the Director General of the International Air Transport Association (IATA).

8. That any carrier party hereto may withdraw from this Agreement by giving twelve (12) months' written notice of withdrawal to the Director General of IATA and to the other carriers parties to the Agreement.

Signed this _____ day of _____ 199__

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* *"WARSAW CONVENTION" as used herein means the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw, 12th October 1929, or that Convention as amended at The Hague, 28th September 1955, whichever may be applicable.*

INTERCARRIER AGREEMENT ON PASSENGER LIABILITY

EXPLANATORY NOTE

The Intercarrier Agreement is an "umbrella accord"; the precise legal rights and responsibilities of the signatory carriers with respect to passengers will be spelled out in the applicable Condiions of Carnage and tariff filings.

The carriers signatory to the Agreement undertake to waive such limitations of liability as are set out in the Warsaw Convention (1929), The Hague Protocol (1955), the Montreal Agreement of 1996, and/or limits they may have previously agreed to implement or were required by Governments to implement.

Such waiver by a carrier may be made conditional on the law of the domicile of the passenger governing the calculation of the recoverable compensatory damages under the Intercarrier Agreement. But this is an option. Should a carrier wish to waive the limits of liability but not insii on the law of the domicile of the passenger governing the calculation of the recoverable compensatory damages, or not be so required by a governmental authority, it may rely on the law of the court to which the case is submitted.

The Warsaw Convention system defences will remain available, in whole or in part, to the carriers signatory to the Agreement, unless a carrier decides to waive them or is so required by a governmental authority.

AEA WP 9

Association of European Airlines

STATEMENT OF THE ASSOCIATION OF EUROPEAN AIRLINES (AEA) ON THE IATA INTERCARRIER AGREEMENTS FOR AN IMPROVED LIABILITY REGIME IN AIR TRANSPORT

(Submitted to the IATA Legal Advisory Subcommittee meeting on 3rd April 1996)

In developing the IATA intercarrier agreements adopted, in Kuala-Lumpur (IIA1) and Miami (IIA2), the industry has achieved a consensus to iinprove significantly carriers' liability regime by waiving the liability limits of thc Warsaw Convention.

It is fair to recognise that these agreements surpass in several respects the expectations of most concerned governments, and even surpass the objectives initially defined by the industry itself at the Washington Airline Liability Conference held in June 1995.

The IIA1 & 2 are the successful outcome of IATA carriers' dedicated efforts to reach a uniform industry. solution. Their drafting has, however, shown the industry's own limitations in its ahility to change further the carrier liability regime, and lhc ensuing need for governments party to the Warsaw Convention to modernise, without any further delay, the. overall system of liability in air transport by amendments of the Cunvention. This became apparent in the IATA debates aimed at reaching a compromise on issues such as the law of passenger domicile and the waiver of the defences under the Convention.

These developments indicate that the IIAs as they stand not only include the best 'available options for a common voluntary scheme for enhanced liability but also represent as far as an industry consensus could be expected to go.

ABA carriers which have signed or are considering signing the IIAs, fully share these views. They firmly believe that further attempts to include additional provisions, such as a fifth jurisdiction clause or to secure a prior agreement on the elements of the IIAs with concerned governments, are likely to undermine the industry's achievements and be counter-productive. The outcome of such a process would not produce any incentive for a carrier-wide adherence to the IIAs. Substantial delays in the implementation of the IIAs will be the inevitable consequence and such delays could in turn lead to a failure of the carriers' initiative.

AEA . carriers view with great concern any further delay iri the industry's implementation process of the IIAs as they stand. They are committed towards implementing a voluntary scheme for an improved airline liability in Europe by 1st November 1996, in accordance with the request of their regulatory authorities. To meet this target date, arrangements need to be made now on the basis of a co-ordinated industry implementation process of the IIAs. These arrangements should include a decision on the filing of the IIAs with relevant governments. AEA carriers expect the Legal Advisory Subcommittee meeting in Montreal lo be successful in this task in order to allow the necessary amendments to carriers' insurance policies, conditions of carriage and tariffs where applicable, to be effective by 1st November 1996 latest.

* * *

CLARK Lorne

From: SINZLSQ
To: CLARKL
Date: April 2, 1996 07:54

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REF:ZL2369/2APR96/LL
RE:IIA IMPLEMENTATION
IATA LEGAL ADVISORY MEETING - 3APR96
SIA WILL NOT BE SENDING A REPRESENTATIVE TO THE FORTHCOMING LAM ON 3APR96 X NONETHELESS, SIA/S POSITION ON THE 2 OUTSTANDING ISSUES ON THE LAW OF DOMICILE N 5TH JURISDICTION ARE AS FOLLOWS:-
LAW OF DOMICILE
IT IS EQUITABLE TT A PAX BE COMPENSATED WITH REFERENCE TO HIS LAW OF DOMICILE AS THIS REFLECTS HIS STANDARD OF LIVING X THE DISCRETION TO MAKE SUCH A REFERENCE SHLD BE GIVEN TO THE PAX RATHER THAN THE CARRIER X IF US DOT INSIST ON A MANDATORY REF, WE WLD NOT OBJECT TO THIS CONDITION X
5TH JURISDICTION
WE DO NOT AGREE, IN PRINCIPLE, TO THE ADDITION OF THE PAX/S DOMICILE TO THE 4 JURISDICTIONS AVAILABLE UNDER THE WARSAW CONVENTION X IF WE ACCEPT COMPENSATION WITH REF TO THE LAW OF DOMICILE, PAX WILL RECEIVE THE COMPENSATION HE WLD HVE RECEIVED IN HIS DOMICILE X WHY THEN SHLD PAX HVE THE OPTION TO INSTITUTE ACTION IN HIS DOMICILE QTN MRK ALTHOUGH WE PREFER NOT TO HVE A 5TH JURISDICTION, IF THERE IS MAJORITY SUPPORT FOR ITS INTRODUCTION, SIA WILL NOT STAND IN THE WAY X
WITH KIND REGDS X STP
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air new zealand

WP 11

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3 April 1996

Mr Lorne S Clark
General Counsel and Corporate Secretary
International Air Transport Association
IATA Building, 2000 Peel Street
Montreal, Quebec
CANADA H3A 2R4

Dear Lorne

Special Legal Advisory Group Meeting - Montreal - 3 April 19%

I am very sorry that I will not now be able to attend the above meeting which clearly will be a critical one cm which the success or failure of our work on passenger liability reform may depend. In view of the significance of the occasion, I have thought it appropriate to set out my thoughts on the outstanding matter and I ask that a copy of this letter be distributed to attendees at the meeting:

1. The contents of the US Department of Transportation's letter of 12 March 1996 should be of no surprise. The DOT has clearly confirmed its requirement for tbe inclusion in the Miami Implementation Agreement (MIA) of a fifth jurisdiction giving access to the courts of the country of the passenger's domicile/permanent residence. I interpret the DOT's comments in relation to Article 20(1) defences, to mean the waiver of such defences up to 100,000 SDRs only, will be acceptable if the fifth jurisdiction is included in the MIA.

2. The DOT'S comments on the concept of the law of the passenger's domicile for determination of damages could also have been expected. This they consider was an ingredient of the Kuala Lumpur Agreement (IIA) and it is clear they do uot accept it should be an "optional extra", as stated in the MIA. Frankly, and this something I tried to convey at our February Miami meeting, I believe the better interpretation of the latter part of Article 1 of the IIA is that the provision does impose an obligation on the part of carriers to allow damages determined by the law of the passenger's domicile. I interpret the undertaking to "take action" embraces not only the waiver of the limit but also its purpose (indicated by the expression "so that"), i.e. determination of damages by the law of the passenger's domicile.

3. As I understand it, the inclusion of the fifth domicile provision in the MIA along the following lines would satisfy the US DOT and obviate the need for inclusion of a provision allowing damages to be determined by the law of the passenger's domicile/permanent residence:

"For the purposes of Article 28 *of the Convention and in addition to any other place specified in that Article, the contract of international carriage shall be considered to have been made through the Carrier 's place of business, if any, in the territory of the domicile or permanent residence of the passenger."*

4. Such a provision would allow access to the courts of the passenger's domicile only if the carrier has a place of business tbere. Assuming such courts would generally apply local law, this would be a somewhat narrower provision than one that would allow the law of the passenger's domicile to determine damages, irrespective of the jurisdiction in which the proceedings were brought. Thus carriers that do not do business in the US would not be amenable to suit in the US courts in respect of US domiciliaries and US damages law would not apply to assessment of awards unless the law of the (foreign) court so required.

5. Foreign carriers that operate flights to and from the US are currently exposed to suit in US courts and application of US damages laws in respect of US domiciliaries (and others) they carry to and from that country by virtue of the existing provisions of Warsaw Article 28. Such flights carry the vastly greater concentration of passengers who would have access right now to US damages laws than any other flights on foreign carriers' network Air New Zealand accepts that risk, as do all of our other industry colleagues operating to and from the US with fewer, or in some cases a significantly higher frequency of services and to and from a larger number of US points.

6. In my view. the number of US domiciliaries travelling solely between two foreign points on any one service of most (if not ail) foreign carriers must pale into insignificance when compared with number of such passengers on any one flight of most foreign carriers into/out of the US. I suggest the total number of US domiciliaries carried by foreign carriers on flights solely between foreign points is minimal when compared with US-originating or US-destined traffic on foreign carrier services.

7. Aside from issues of principle, one must ask how much would be conceded and how much greater would be foreign carriers' exposure to the US courts be if the fifth jurisdiction concept were accepted. Certainly, there would be some increased exposure merely because foreign carriers do carry US domiciliaries who under the present Article 28 regime would not have access to US courts. But this increase would, I suggest, constitute a very small percentage of a carrier's total passengers, a very small percentage of passengers on flights between foreign points and a very small percentage of all passengers or US domiciliaries alone on flights to or from the US.

8. As a matter of principle, equity or social justice, and aside from the focus on the US passenger, I consider the law of the passenger's domicile to be the most appropriate reference point for determining compensation and the forum best equipped to apply that law is the court in the territory of the passenger's domicile. (An *article by Professor Allan Mendelsohn* (1967) 33 *Journal of Air Law and Commerce* highlights *the* essentially fortuitous nature of the present Article *28* jurisdictions.) The right of access of the citizens of any country to their own courts must be of benefit if they would otherwise be restricted to suit in jurisdictions that did not allow for fair and reasonable compensation by the standards of their own domicile. New Zealand citizens would clearly be advantaged by the inclusion of such a facility.

9. Montreal Protocol No. 3 (MAP3) promised the introduction of the fifth jurisdiction into the Warsaw system. IATA carriers have long promoted the acceptance of MAP3 and accepted the additional jurisdiction, albeit in the context of the increased limited liability regime of the Protocol. Nevertheless, the principle still remains. It is not surprising that the European Union incorporated the concept in its proposed liability regulations for implementation of the IIA. The US DOT is thus not alone in stating this requirement.

10. The IATA carriers took the initiative to explore reforms of the Warsaw system when governments appeared unable or unwilling to achieve results and we promised much in the Washington Conference of July 1995. Admittedly we have gone further than most of us initially envisaged. The US DOT Order of February 1995 enabled our discussions to get off the ground. Some of the "guidelines" of that Order were not accepted by the Conference, and for good reason, in the context of what was then anticipated by many as a two-tier system involving a Supplemental Compensation Plan. Having now gone to what is effectively strict and unlimited liability under the IIA and MIA, is it unreasonable to also allow the inclusion of the fifth jurisdiction? The greatest, most significant and most revolutionary step was acceptance of unlimited liability. The additional cost (if any) of inclusion of the fifth jurisdiction really significant?

11. I readily acknowledge that the most appropriate way to insert the fifth jurisdiction is by amendment of Warsaw. Nevertheless, there is a body of learned opinion that considers it may be included by a contractual provision of the type indicated in paragraph 3 above. (One assumes tbat the E.U. considered the issue of enforceability of the provision it has included in its proposed Council Regulation) Even the opinion of December 10, 1995, obtained by IATA from an eminent jurist (W.P.5 Miami meeting documentation) allows that carriers may offer "in advance that in case of accidence they would be ready, in countries where they have an establishment to accept the jurisdiction of the courts of the passenger's domicile in cases where the victim or those representing him so desire." Such a provision is clearly intended to benefit potential claimants and I would expect public policy to play a critical role in determining whether a court would accept jurisdiction pursuant to such a provision - particularly in US Courts when the law of alternative Article 28 jurisdictions would not allow the determination of compensation acceptable by US standards.

12. If the fifth jurisdiction is not included will the foreign carriers initiate a conflict with the US DOT? Presumably, the DOT will not resile from its stated position and will reject the IIA and MIA as given the clear statements in its letter of 12 March 1996, one cannot envisage these agreements will be approved without this ingredient. Where does this leave tbe foreign carriers? Will the DOT take action to substantiate its requirements? Given the position it has taken to date and clearly communicated to the carriers, I would expect some response. It could be by conditioning foreign air carrier permits. If so, are the foreign carriers prepared to initiate costly and protracted litigation if that occurs? Is the issue really worth such a contest? (While there is no evidence that the YJS is considering denunciation it cannot be discounted and one should not underestimate the ability of interested pressure groups to persuade the US Government to react in such a manner.)

13. I believe a voluntary arrangement is to be preferred to one that may be imposed on carriers. I recognise I may be in a minority on this issue but in the final analysis I see little merit in a course of action whose objective is to prevent what I consider to be, in context, a relatively small number of claimants from gaining access to the courts of their domicile or permanent residence.

I wish you well in your deliberations.

Yours sincerely

Tony Mercer

Anthony G Mercer
COMPANY SOLICITOR

Info Paper 2

RECEIVED BY
IATA LEGAL DEPARTMENT
- 2 APR 1996

To : **Mr Lorne S. CLARK**
General Counsel and Corporate Secretary
IATA
Geneva

From : **ECAC** **Fax n°** : **33 (1) 46 24 18 18**
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Number of pages : 1

Please notify any transmission problems (e.g. blank or missing pages) by telephone to : 33 (1) 46 41 85 56

EC 9/9.4/2.12-0579 1 April 1996

Subject : IATA Legal Advisory Group Subcommittee on Passenger Liability - Montreal 3 April 1996

Dear Mr Clark

I have the honour to confirm to you that ECAC will not be represented at the above-mentioned meeting, as previously indicated to you.

However, I thank you for having provided us with the documentation of this meeting.

I would also like to inform you that ECAC Directors General of Civil Aviation (DGCA/96, Paris 27 March 1996) have endorsed the conclusions which were presented to them by the Chairman of the EURPOL Task Force, and in particular have considered that the IATA Intercarrier Agreement signed in Kuala Lumpur on 31st October 1995, together with the Implementation Agreement concluded in Miami on the first February 1996, are a positive response to the ECAC Recommendation.

A letter encouraging adherence to the IATA Agreements will be sent by Mr V.K.H. Eggers, President of ECAC, to IATA and to the associations of European airlines.

Yours sincerely,

R. BENJAMIN
Executive Secretary of ECAC

WORKING PAPER

INTERNATIONAL CIVIL AVIATION ORGANIZATION

Info Paper 3

C-WP/10381
5/3/96

COUNCIL – 147"' SESSION

REPORT ON MODERNIZATION OF THE "WARSAW SYSTEM"

Subject No. 16: Legal Work of the Organization
Subject No. 16.3: International Air Law Conventions

(Presented by the Secretary General)

SUMMARY

This paper presents for Council's information the results of the deliberations of the Secretariat Study Group on the "Warsaw System" and their recommendations concerning the adoption of a new international instrument to modernize the legal framework for air carrier liability, and invites the Council to approve these recommendations.

REFERENCES

AT-WP/1769
AT-WP/1773
C-WP/10289
C-DEC 146/3

1. INTRODUCTION

1.1 The Council, on 15 November 1995 during its 146th Session, decided to amend the second item of the General Work Programme of the Legal Committee to read: "The modernization of the 'Warsaw System' and review of the question of the ratification of international air law instruments." The Council further decided that a Secretariat Study Group be established to assist the Legal Bureau in developing a mechanism within the framework of ICAO to accelerate the modernization of the "Warsaw System". The Group was requested to provide the Legal Bureau with its views which should permit the Council to consider the appropriate steps to be taken for the modernization of the "Warsaw System". The Legal Bureau was requested to present its Report to the Council during its current (147th) Session.

1.2 This paper summarizes the discussions and recommendations of the Study Group which met on 12-13 February 1996 in Montreal. The Report of the Study Group is reproduced in the Appendix to this paper.

DIGEST MAR 12 1996

1.3 In accordance with the decision of the Council referred to in paragraph 1.1 above, the Study Group used as basis for its discussions the terms set out in C-DEC 146/3, and in particular the results of the socio-economic analysis of the limits of liability under the Warsaw Convention System undertaken by the Air Transport Bureau in conjunction with the International Air Transport Association (IATA) (AT-WP/ 1769 and AT-WP/1773), the comments thereon by the Air Transport Committee (ATC), and other related work undertaken by IATA, including the Intercarrier Agreement on Passenger Liability (Kuala Lumpur, 31 October 1995) (Appendix B to AT-WP/1773).

1.4 As regards the comments of the Air Transport Committee on the socio-economic study, the Study Group was informed that in considering this subject on 24 January 1996, the Air Transport Committee had decided, in view of the complexity of the issues, to refer to the Study Group the analysis of this matter which should form part of the Report to the Council.

2. STATUS OF WARSAW CONVENTION SYSTEM

2.1 After more than two decades of unsuccessful attempts to bring the Guatemala City/Montreal Protocol amendments into effect, certain States, regional and global organizations, and air carriers have proposed or taken action to raise air carrier limits of liability to what they consider appropriate levels. It was considered that the limits available under the Warsaw Convention and the Hague Protocol had been eroded by inflation and were no ionger responsive to current socio-economic developments. However, these steps present a serious risk of fragmentation and were seen as interim solutions, awaiting action by governments to promote through ICAO a modernized legal framework and harmonize the needs of the air transport community world-wide.

3. NEED FOR ICAO ACTION

3.1 The Group was unanimously of the view that ICAO action is urgently needed to redress the major shortcomings of the present system of liability, particularly regarding passengers, but also for baggage and cargo, and to develop a new international instrument to consolidate the Warsaw System, bringing it in line with today's requirements.

4. TWO-TIER LIABILITY REGIME FOR PASSENGERS

4.1 After considerable discussion on the justification for and appropriate level of liability limits, the Study Group recommended the adoption of a two-tier liability regime providing for compensatory, recoverable damages in case of accidental death or injury of passengers up to the amount of [100,000 SDR] irrespective of the carrier's fault, and liability of the air carrier on the basis of carrier's negligence for amounts exceeding [100,000 SDR], the defence of contributory negligence of the passenger, remaining available to the air carrier in both instances.

4.2 This new approach .not only incorporates elements of the Guatemala City/Montreal Protocol amendments, but also attempts to address the inherent deficiencies of the present system, in particular the dissatisfaction with currently prevailing limits of liability and problems associated with the attempts of circumventing them. The Group firmly believed that limits of liability of the type presently

contained in the Warsaw Convention System are not susceptible to world-wide unification due to the diversity of socio-economic circumstances and varying costs of living in different parts of the world.

4.3 Under this proposed mechanism, full recovery of damages sustained is no longer predicated upon proof of wilful misconduct on the part of the air carrier since it is sufficient to establish the required element of negligence in order to be compensated.

4.4 The Group reiterated that the suggested approach still limits the amount of compensation to the extent of recoverable, compensatory damages to be proved by the claimant; it also considered the insurance aspects of such proposal.

4.5 With respect to paragraph 4.1, it should to be noted that the figure of [100,000 SDR) as threshold for the application of the second tier of liability was set as a tentative figure for the purpose of the Group's discussion and recommendations. In order to take account of the situation of developing States, the Group considered that, in future deliberations within ICAO, the adoption of a mechanism could be explored permitting developing States to apply a lower amount: such mechanism might be suitable for States where experience with settlement of claims has shown that the amount of compensation will virtually always remain below [100,000 SDR] per passenger. A similar mechanism is also foreseen in the Implementation Agreement to the IATA Intercarrier Agreement.

4.6 The Study Group also examined questions relating to the standard and burden of proof to be employed in the new instrument in the second tier of liability. It agreed to retain the concept of negligence, leaving open for further discussion in the ICAO Legal Committee the question whether the passenger has to prove negligence of the carrier or whether the air carrier has to prove absence of negligence. This question was left open not only because of differing views among the Members of the Study Group but also because of known positions among Member States.

5. REVISION OF BAGGAGE LIMITS OF-LIABILITY

5.1 The Group concluded that there should be a revision of limits of liability for damage to, or loss or delay of, baggage comprising checked and unchecked baggage. It also believed that further consideration should be given to introducing different types of limits than those presently contained in the Warsaw Convention System.

6. MODERNIZATION OF RULES REGARDING PASSENGER TICKET, BAGGAGE CHECK, AND OTHER DOCUMENTARY REQUIREMENTS

6.1 The Study Group further recommended to modernize the rules on the passenger ticket, baggage check, and other documentary requirements with the aim of achieving simplicity and compatibility with modern technologies.

7. ADOPTION OF A NEW CONSOLIDATED INTERNATIONAL INSTRUMENT

7.1 There was consensus to promote the adoption of a single, consolidated legal instrument which will incorporate useful elements of other instruments of the Warsaw System, to the extent that they are consistent and compatible with the other recommendations.

7.2 The Group considered the question whether any new instrument should contain a provision for an additional forum, namely the place of the domicile or permanent residence of the passenger, and whether it should also address matters related to liability in cases of code sharing and other forms of airline cooperation, but decided not to make any firm recommendations without further studies.

7.3 The Group further examined several other mechanisms which could usefully be accommodated in the new framework and which might deserve further study in the future work to be carried out. The relevant considerations are reflected in paragraphs 6.24-6.33 of the Report.

8. RATIFICATION OF MONTREAL PROTOCOL NO. 4

8.1 The Group unanimously expressed the view that ICAO should continue to encourage ratification of Montreal Protocol No. 4 so that its provisions could enter into force while awaiting the completion of the work on the new instrument.

9. RECOMMENDATIONS OF THE STUDY GROUP

9.1 After finalizing their deliberations, the Study Group adopted the Recommendations set out in paragraph 9.2 below for consideration by the Secretary General and subsequent submission to the' Council. As regards Recommendation 2, the Council is invited to approve this Recommendation in principle only, since it may wish to leave the fine-tuning and the legal details of the proposal to further discussions in the Legal Committee. Approval of the action plan set out in Recommendations 1 and 3-9, and approval in principle only of the approach taken in Recommendation 2 does not in any way prejudge. any action States may take or may consider with regard to the IATA Intercarrier Agreement. While the Recommendations are compatible with the Intercarrier Agreement, they are not identical with it; nor are they in any way linked. Therefore, the Council is invited to consider the following Recommendations on their own merits.

9.2 The Study Group recommends:

1. that action should be taken to develop a new international instrument to consolidate and modernize the Warsaw Convention System and bring it in line with presentday requirements;

2. that such new instrument should, in particular:

   a) provide for a two-tier liability regime for recoverable compensatory damages in case of injury or death of passengers, comprising:

      i) liability of the air carrier up to [100,000 SDR] irrespective of the carrier's fault;

      ii) liability of the air carrier in excess of [100,000 SDR] on the basis of the carrier's negligence,

   the defence of contributory negligence of the passenger or claimant being available in both instances;

b) revise the limit of liability for checked and unchecked baggage;

c) modernize the provisions regarding the ticket and other documentary requirements;

d) include elements of the Warsaw Convention, the Hague, Guatemala City, and Montreal Protocols as well as the Guadalajara Convention, to the extent that they are appropriate, give effect to, and are consistent with the foregoing.

3. that such action be commenced without delay;

4. that a first draft for the new instrument be developed by the Legal Bureau, with the assistance of the Study Group; that a Rapporteur be appointed by the Chairman of the Legal Committee to review and revise the draft and present a report thereon;

5. that the draft instrument, together with the Rapporteur's report, be **submitted to a** Sub-Committee of the Legal Committee, which should be convened for this purpose as early as possible;

6. that as early as practicable thereafter, the matter be reported to the Legal Committee;

7. that upon approval of the draft instrument by the Legal Committee, the Council convene a Diplomatic Conference as soon as possible for the formal adoption of the instrument;

8. that the Council urge States which have not done so, to ratify Montreal Protocol No. 4, relating to cargo liability;

9. **that the** Secretary General **be** requested to take all necessary measures for the early **implementation** of this action plan.

10. ACTION BY THE COUNCIL

10.1 On the basis of the Report of the Secretariat Study Group, the Council is invited:

a) to note this paper and the attached Report;

b) to approve the Recommendations of the Study Group set out **above, but** to approve the approach with respect to Recommendation 2 of paragraph 9.2 above in principle only;

c) to refer this matter, in line with Recommendations 4 - 6 of paragraph 9.2 above, to the Legal Committee, which should report back to the Council as soon as possible.

APPENDIX A

REPORT OF THE

SECRETARIAT STUDY GROUP ON THE MODERNIZATION OF THE WARSAW CONVENTION SYSTEM

(Montreal, 12-13 February 1996)

1. INTRODUCTION

1.1 Pursuant to the decision of the ICAO Council taken at its 146th Session on 15 November 1995 (C-DEC 146/3), a Study Group was established to assist the Legal Bureau in developing a mechanism within the framework of ICAO to accelerate the modern&ion of the Warsaw Convention System.

1.2 The President of the Council, Dr. Assad Kotaite, opened the meeting and, on behalf of the Council and Secretary General, welcomed the Members of the Group. In his opening address, he recalled that the modernization of the Warsaw Convention System had been the subject of a number of diplomatic conferences and amending international instruments since the adoption of the original Convention in 1929. The limits of air carrier liability and their socio-economic aspects presented particularly difficult problems. None of the four Protocols adopted in 1975 to amend the Warsaw Convention System had so far entered into force. The Council decided therefore in June 1994 that a socio-economic analysis of the limits of liability should be undertaken by the ICAO Air Transport Bureau in co-ordination with the International Air Transport Association (IATA). The 31st Session of the Assembly had mandated the Council to continue its efforts to modernize the Warsaw System as expeditiously as possible. The Council had therefore decided to establish the Study Group to assist the ICAO Legal Bureau in developing a mechanism within the framework of ICAO to accelerate the modernization of the Warsaw System. The Legal Bureau was requested to present a Report to the Council during its current (147th) Session. The President concluded by stating that the subject was complex and had multilateral aspects; the Group was requested to provide the Legal Bureau with its views which would permit the Council to consider the appropriate steps to be taken for the modernization of the Warsaw System.

1.3 The Members of the Study Group having attended the meeting are listed in Attachment A. Members attended the meeting in their personal capacity; their views ought not be attributed to their Governments or other institutions with whom they may be affiliated. Dr. L. Weber, Director of the Legal Bureau, was the Moderator of the Study Group. He was assisted by Mr. J.V. Augustin, Legal Officer, Mr. A. Jakob, Legal Adviser to the Director, Legal Bureau and Mr. A.A. Costaguta, Chief, Statistics and Economic Analysis Section, Air Transport Bureau.

2. TERMS OF REFERENCE

2.1 In accordance with the decision of the Council referred to in paragraph 1.1 above, the Study Group used as basis for its discussions the terms set out in C-DEC 146/3, and in particular the results of the socio-economic analysis of the Iimits of liability under the Warsaw Convention System undertaken by the Air Transport Bureau in conjunction with the International Air Transport Association (IATA) (AT-WP/1769 and AT-WP/1773), the comments thereon by the Air Transport Committee (ATC), and other related work undertaken by IATA, including the lntercarrier Agreement on Passenger Liability (Kuala Lumpur, 31 October 1995) (Appendix B to AT-WP/1773).

3. DOCUMENTATION

3.1 A list of documents presented to and considered by the Study Group is found in Attachment B.

4. AGENDA

4.1 At the Moderator's proposal, the Study Group adopted the agenda of the meeting-set out in Attachment C.

5. GENERAL DISCUSSION

5.1 The Moderator recalled the mandate which the Council had given to the Working Group, as referred to in paragraph 2.1 above. The materials set out therein should form the basis of discus&ions.

5.2 As regards the comments of the Air Transport Committee on the socio-economic study, the Study Group was informed that in considering this subject on 24 January 1996, the Air Transport Committee had decided, in view of the complexity of the issues, to refer to the Study Group the analysis of this matter which should form part of the Report to the Council.

5.3 The Moderator pointed out that 25 years had elapsed since the adoption of the 1971 Guatemala City Protocol, and more than 20 years since the four Montreal Protocols of 1975. Pending entry into force of Additional Protocol No. 3 of 1975, ICAO had refrained from any action which would impede its ratification. However, during the' last five years, certain States, regional and global organizations, and air carriers had each proposed or taken action to raise air carrier limits of liability to what they considered to be appropriate levels. The limits under the Warsaw Convention and the Hague Protocol had been eroded by inflation. Therefore, the first question to be considered was whether or not ICAO should take new action to modernize the Warsaw System, focusing for the time being on passenger liability Iimits and leaving baggage and cargo limits aside.

5.4 The Group was unanimous that ICAO action was necessary to modernize the System. It was recognized that the Warsaw System as such should be preserved, but that major shortcomings needed correction. The majority of States responding to the Questionnaire were dissatisfied with the present regime, and in particular with the limits of liability. The level of these limits meant that the

interests of the passengers were not sufficiently taken into account, and the Warsaw Convention encouraged litigation by claimants to break the existing limits. Certain initiatives had been taken recently, but these were interim in nature, awaiting action by governments. Governments should now take their responsibility. Several Members felt that modernization had to focus on both the limits and the nature of the carriers' liability. The view was expressed that if world-wide uniformity was desirable, ICAO had to act in this area. One Member indicated that it was necessary to have a new international instrument, with the possibility of ICAO periodically adjusting the limits of liability. Another Member felt that ICAO action could be viewed from both the short-term and long-term perspectives: in the immediate future, the Organization could pronounce itself on some of the principles agreed to by the carriers, as well as promote knowledge of the Warsaw System; in the long-term, consideration should be given to amending the System.

6 . DISCUSSION OF ISSUES RELEVANT TO MODERNIZE THE WARSAW SYSTEM

a) Revision of passenger liability limits

b) Revision of liability regime

c) Implications of current other initiatives, including the IATA Intercarrier Agreement

6.1 The Moderator invited views on the question whether there should be a revision or even removal of the passenger liability limits in the Warsaw System. This issue could not be properly discussed without taking into consideration Agenda Items 3 b) and c); it was therefore decided that all three issues should be dealt with concurrently.

6.2 Many Members were of the preliminary view that the concept of limitation of liability should be abandoned as limits were not susceptible to world-wide unification and difficult to reconcile with varying socio-economic factors throughout the world. Furthermore, the mere existence of limits would encourage litigation to break those limits and from the consumer's viewpoint, limits of liability inequitably favoured the air carrier. One Member was of the opinion that liability limits were normal, taking into account the need for insurance; he preferred however, a limit below which the carrier would be strictly liable, but that the carrier would be subject to unlimited liability if its actions were tortious or delictual. Another Member expressed the view that limits of liability departed from the fundamental legal principle that one is fully liable for damage one has caused. The view was expressed that airlines were considering eliminating the limits of liability under the Warsaw System, and that governments may now be willing to re-examine the question. Some Members stated that one of the reasons why carriers now favoured unlimited liability was that insurance premiums would most likely increase on a one-time basis with adjustments made in the light of experience; any regime providing for limits would allow the insurance industry to make continuous upward increases to the premium payable in cases of upward revision of limits. Many Members of the Group were of the view that the abolition of limits of liability would be the most comprehensive solution, but acknowledged that this would represent a substantive departure from the status *quo.*

6.3 Another Member of the Group pointed out that Articles 22 and 25 of the Warsaw Convention were to be seen as the main aspects of the current problem. He expressed the view that the issues of limits of liability and issues of fault of the air carrier were intertwined. He also viewed recent

concerted actions of the air carriers and regional developments as evidence that air carriers were in principle willing to question the merits of limits. He cautioned, however, that air carriers must not be pushed into the role of an insurer of the passenger and also that air carriers from developing countries may find it hard to agree to a general waiver of all liability limits.

6.4 Some Members favoured a regime of liability which would require the carrier to prove that it was not at fault; others would see the passenger or claimant having to prove the fault of the carrier. One Member questioned the acceptability by governments of a regime which provided for unlimited liability of the carrier based on its presumed fault, which he thought was tantamount to strict liability. Another Member favoured the strict but not absolute liability of the carrier, coupled with no limits of liability. Another Member stressed that care should be taken in moving from the Warsaw System to the other extreme of providing for unlimited and absolute liability, and that no airline should be so penalized that it became a matter of survival.

6.5 One Member stressed that the acceptability of a regime by carriers did not necessarily mean acceptability of that regime to governments also; governments had to consider not just the regime in the aviation field but also that applied to other modes of-transportation. Another Member, however, questioned the extent to which considerations relating to other modes of transportation should impact on what he thought was the universal and most widely used form of transportation, namely, aviation.

6.6 In view of the foregoing, the question arose as to the manner of interpreting certain replies to the ICAO and IATA questionnaires. The Group was informed by the Secretariat that replies were received before the air carriers initiated the discussions which led to the new IATA Intercarrier Agreement (ICA) which does not set out any specific limit of liability. One might therefore assume that the responses were predicated on the continued existence of limits of liability, albeit increased.

6.7 One Member of the Group believed that the removal of liability limits in the ICA had not faced major opposition among the air carriers, and that therefore, one could expect a similar reaction in those cases where governments were shareholders in the air carrier. This view was also shared by another Member of the Group, though in general, the Group acknowledged that a distinction should be made with respect to the commercial entity (air carrier, which may be State-owned) and governments. Two Members cautioned as to the acceptability of the ICA to carriers themselves, one of these Members. noting particularly that a number of middle-size and small airlines were unhappy with the result.

6.8 One Member questioned the meaning of the concepts of strict liability and fault-based liability. The view was expressed that, in practice, fault-based liability under the Warsaw Convention was close to strict liability and that the defences available to the carrier under Article 20 of the said Convention were usable in only a few cases, although the theory and perception was that there was a greater difference between the two. Another Member cautioned against delving too deeply into definitions at this stage of the work.

6.9 Although he favoured the concept of unlimited liability, one Member believed that all options should remain open for future consideration, including the possibility of having limits of liability. However, since the main beneficiaries of limits were of the opinion that they no longer required it, he wondered as to who would in fact favour having limits.

6.10 One Member stated that any proposal should try to accommodate the position taken by the United States Government since endorsement by that State was necessary to have a world-wide, effective solution.

6.11 In summing up the discussion to this point, the Moderator indicated that two positions had been developed:

1) the first view was in favour of removing the limits of liability, leaving open for the time being whether such liability should be based upon the presumed fault of the carrier or upon fault of the carrier to be proved by the claimant; and

2) the second view was that there should continue to be limits of liability, adjusted upwards from what currently prevailed, leaving open for the time being whether this should be based on strict liability up to a certain limit or remaining with the present system of presumed fault liability found in the Warsaw Convention.

6.12 Some Members of the Group called attention to the fact that there could be a misconception about the term "unlimited liability" since even under this regime the amount of compensation would be limited to the extent of proven, recoverable damages. Further, a liability Iimit did not mean an automatic recovery of that amount but was rather a ceiling not to be exceeded.

6.13 The possibility was explored of finding a compromise in providing for a limit of liability with an "optional ceiling", which would be set by governments by legislation with respect to their own flag carriers or their territory. Such instrument would have the advantage of maintaining a limit without precluding the adoption of a higher limit or no limit at all. In this context, the Group then examined. solutions in legal instruments dealing with other modes of transportation, in particular the *Convention on the Contract for the International Carriage of Passengers and Luggage by Road* (Geneva, I March 1973). In this instrument, a liability limit was set, with the possibility for a Contracting State, at its discretion, to set a higher limit by legislation or no limit at all. However, the Group felt that such a system would sacrifice uniformity.

6.14 One Member was of the opinion that to have a univers ly acceptable system, certain compromises should be made. Some States would champion the cause f the consumer, others the air carriers. He suggested a two-tier system of liability:

1) up to 100,000 SDR, the carrier would be presumed to b liable @resumption of fault);

2) beyond that limit, the carrier would be liable on the b is of fault (negligence of the carrier would suffice).

6.15 In discussing the question of punitive damages within e above framework, there was a general consensus that the award of punitive damages should not be part of any new regime to be developed. One Member observed that in practice, the award of pu tive damages was in fact not currently a big concern of airlines; he was of the view that the wording of the Warsaw Convention did not sanction the award of punitive damages.

6.16 On this basis, there was general support within the Group for the two-tier framework set out above. However, one Member of the Group expressed his wncem that Additional Protocol No. 3 of 1975 had a system of strict liability for 100,000 SDR, and that the current proposal was a step backwards in that the award of the first 100,000 SDR would be on the basis of the presumed fault of the carrier. He proposed that the limit of 100,000 SDR should be on the basis of the strict liability of the carrier (irrespective of the carrier's fault), in line with the Protocol. There was a general agreement within the Group with this proposal.

6.17 The question was raised whether certain States, especially developing States, should be able to choose a lower threshold of liability within the first tier since the majority of claims handled in these countries would generally fall below the amount of 100,000 SDR. It was noted that this mechanism is foreseen in Article II(2) of the Agreement Implementing the IATA Intercarrier Agreement, and that the matter could be further pursued in future ICAO deliberations.

6.18 As to awards beyond 100,000 SDR which would be subject to the fault or negligence of the carrier, the Group examined the question of the applicable law to determine negligence and the related question whether the concept was easily understood world-wide. It was stressed that for the sake of uniformity, certain concepts in the Warsaw Convention should be retained since these had been subjected to decades of judicial interpretation. The Group felt, however, that the matter of defining the concept of fault or negligence would be better handled at a later stage in ICAO's work and that it should concentrate for the time being on broad principles only,

6.19 In relation to awards over 100,000 SDR, three Members preferred that the carrier should be liable on the basis of presumed fault rather than on mere fault to be proved by the passenger or claimant. To support this position, it was mentioned that carriers had made clear statements that the passenger should be protected, and to require the passenger to prove fault of the carrier was less consumer friendly; it was preferable for the carrier to be put to prove its absence of fault. On the other hand, one Member felt that this would be akin to imposing strict liability on carriers for damages exceeding 100,000 SDR, and could not agree with this suggestion. The Group therefore agreed to the two-tier system, leaving the question unsettled of who should have the burden of proof in the second-tier. It also agreed that the figure of 100,000 SDR as the threshold for the application of the second tier was tentative. It further agreed, without extensive debate, that the defence of contributory negligence as set out in Article 21 of the Warsaw Convention, should continue to be available to the carrier in respect of both tiers.

d) Possible revision of baggage and/or cargo liability limits

6.20 The Study Group decided that issues of baggage and cargo should be dealt with separately.

i) Baggage

6.21 Most Members felt that the current liability regime for baggage was unsatisfactory as the courts were finding ways to break the limits and the settlement of baggage claims were costly and occupied much of the carriers' time. General consensus prevailed that any new instrument should revise the existing limit of liability for damage to, or loss or delay of, baggage. One Member proposed that the existing limits should be substantially increased; some Members believed that at this stage it would

be premature to opt for any specific limit. Many Members stressed that any new system should be as simple as possible. Several Members therefore preferred a limit per passenger (to encompass checked and unchecked baggage) as opposed to weight or pieces of baggage. However, it would be left for future work of ICAO to decide on these questions.

ii) Cargo

6.22 The Group was unanimous that ICAO should continue to encourage ratification of Montreal Protocol No. 4 (MP 4), which could rapidly come into force, the number of ratifications necessary having almost been reached. One Member was of the view that in the context of liability, cargo was not of much wncem as consignors and air carriers were in a more equal commercial relationship than was the case between passengers and carriers. Another Member pointed out that it was possible for the consignor to obtain higher coverage by making a special declaration and paying a supplementary sum. Another Member believed that the limits for cargo should be raised, and that consideration should be given to setting limits in respect of containers or some other unit as opposed to weight, this latter point being supported by another Member. One Member believed that a periodic adjustment mechanism was necessary in any new cargo liability regime.

6.23 The general sentiment among the Members of the Group was that any impediment to the entry into force of Montreal Protocol No. 4 should be avoided. This Protocol was useful in itself and a step forward; its provisions could, *inter alia*, be incorporated into additional improvements to be achieved in the future. The Council should therefore urge States not yet having done so to ratify Montreal Protocol No. 4 without delay.

e) Other points

i) Compulsory up-front payments

6.24 The Group further reviewed current proposals by the European Union and ECAC providing for a compulsory up-front payment mechanism in cases of accidental death or injury of a passenger. One Member of the Group expressed support for this idea as it would guarantee the quick payment of funds required to cover expenses, e.g. for hospitalization or funeral costs. The Group sympathised with the principle that was sought to be achieved by such mechanism. However, the majority of Members were reluctant to endorse any proposal which would mandatorily require the air carrier to pay out a specified amount within a predetermined period of time. It was believed that such a general obligation would not appropriately take into consideration the diversity of facts of each case and would not be responsive to the variety of local customs associated with the actual settlement of the claims. For instance, it was argued that it is not always possible for the air carrier to easily determine the beneficiary or recipient. Some Members of the Group indicated that it was already a common voluntary practice among air carriers to provide for such financial assistance where circumstances so warranted, and this flexible approach should be maintained. One Member stated that IATA was developing a Code of Recommended Settlement Practices for air carriers, and he would prefer to see the subject covered in the Code rather than in a new binding international legal instrument. Several Members believed that the European proposals ought to be seen in light of the current deficiencies of the Warsaw System. Some Members suggested that any new instrument should contain some general principles on the subject to recognize the existing practice, but that such payments should not be made mandatory and the carrier

should be left with discretion to deal with cases as they arose. One Member expressed concern that any general principle could result in concrete obligations through judicial interpretation.

6.25 After further discussion, the Group concluded that in view. of.its proposals on limits and. regime of liability set out above, this area of wncem would lose some of its-significance and.no specific recommendation for compulsory up-front payment clause should be made at this time. However, the Group believed that this issue could be revisited in the future work on the modernization of the Warsaw System.

ii) Speedy settlement of uncontested part of claim

6.26 The Group viewed this issue as being closely connected to &previous item:and thought that the carriers needed flexibility to deal with cases as they arose. Consequently, the Group believed that no binding provisions on this subject should be recommended.

iii) Fifth jurisdiction

6.27 The Group then debated whether a new instrument should contain a provision for a fifth jurisdiction under which an additional forum, namely the place of the domicile or. permanent residence. of the passenger, would be available to claimants. It was noted that such; a. provision was already included in Additional Protocol No. 3 (incorporating the Guatemala City Protocol) which allows a claim to be brought before the court of the domicile or permanent residence of the passenger providedthat the carrier has an establishment there. The Group further acknowledged that the United.States. Government demanded such additional forum; similarly, current proposals of the European Union also included such a provision. The views on this matter were divided.

6.28 One Member clearly supported the notion of a fifth jurisdiction and stated. that every passenger should have the right to sue the air carrier in his own State, provided the air. carrier. was engaged in doing business there.

6.29 Another Member did not in principle reject the.notion of a fifth jurisdiction but cautioned. that some European States. might have difficulties in agreeing to such a proposal, being-particularly. concerned that a United States resident could resort to United States courts even in the case of an accident. occurring between two points outside of the United States and on a non-United States carrier.

6.30 Several Members opposed the notion, one believing that this would create. an undue additional burden on foreign air carriers and would have an impact on insurance premiums. He believed that any such proposal went beyond modernization of the Warsaw System and changed some fundamental rules. He did not view a fifth jurisdiction as being necessary, and was of the opinion that carriers would, strongly oppose its introduction. He suggested that States which had ratified Additional Protocol No. 3, which contains a fifth jurisdiction, did so because of the unbreakability of the limit under that Protocol. However, the incorporation of the fifth jurisdiction coupled with the. recommendations on the limits and regime of liability adopted by this Group significantly increased the level of risk for air carriers.

6.31 Finally, another Member cautioned that concentration of efforts on the concept of a fifth jurisdiction might delay or stop progress on the main purpose of the modernization process, which was a re-examination of Articles 22 and 25 of the Warsaw Convention. It was therefore decided not to include this matter in the recommendations of the Group.

iv) Update mechanism

6.32 The Group discussed whether to recommend an update mechanism which could be used to adjust the limit of the first tier to reflect inflation or changes in, other economic factors. The predominant opinion in the Group was not to include such a mechanism. It was observed that previous proposals for an update mechanism were predicated upon the continued existence of the concept of limited liability. Some Members believed that the Group's proposals were already far-reaching and innovative; any further extension of liability in the first tier could jeopardize acceptability to States. Furthermore, one Member of the Group believed that a retention of the special contract provision in the Warsaw Convention could be used to accommodate the adjustment of the first tier, if required.

6.33 One Member, however, was in favour of such a mechanism in relation to the first tier to take into account changes in economic factors. Another Member felt that if such a mechanism was necessary, ICAO or IATA should be involved in the process of periodic review.

v) Ticket and other documentary requirements

6.34 It was pointed out by the Moderator that under the present System, there existed a number of rules on the passenger ticket and baggage check. He inquired whether the Group felt that these needed to be modernized. The Group unanimously agreed that these rules should be modernized and that the opportunity should be taken to study the subject. One Member stated that the documentary requirements should be overhauled, particularly with the aim of achieving simplicity, and should be fully compatible with modern technologies in order to accommodate features like "ticketless travel". It was also pointed out by this Member that essential information (i.e. place of departure/destination) would still be required to be shown on the ticket since those elements have implications for the application of the Warsaw Convention (i.e. Article 28). It was decided to recommend that the rules on tickets and other documentary requirements be modernized.

vi) Code sharing

6.35 The Group further discussed whether a new instrument should also address matters related to liability in cases of code sharing, franchising and other forms of airline cooperation. The general agreement was that this matter did not require high priority at the present stage of the work of the Group. Some Members believed, however, that this area should be further studied. One Member stated that the concept of the actual carrier already accommodated certain aspects of the problem and that the crucial question was whether the passenger had been notified of the carrier he or she would be travelling on. Another Member believed that code sharing became important in this respect only if a fragmented liability system existed and that once uniformity was achieved, the problem would lose some of its significance. It was agreed not to include this matter in the Group's recommendations.

vii) Point of reference for revision

6.36 The Moderator invited views on the question of the point of reference to be used as the basis for the revision and modernization of the Warsaw System. Most Members favoured the use of the original 1929 Convention, one reason being that its provisions have been subjected to decades of judicial interpretation; one Member believed that the Hague Protocol should be used. However,the consensus was that the overriding objective should be the adoption of a single, consolidated legal instrument and that although the original Convention could be used as a starting point, useful elements of other instruments of the System should be taken into account where they were consistent and compatible with the other recommendations of this Group.

viii) Liability insurance

6.37 The Group then examined the question whether any new instrument should require the . . . carrier to carry sufficient insurance to cover liabilities which may be imposed upon it. The majority of the Group believed that this was a subject best left to governments to deal with in their relationship with carriers and not embodied in a new instrument, one Member stating that it should be dealt with as a requirement to be fulfilled before a license is granted by the government. One Member, believing that the carrier should be able to meet its liabilities, was doubtful whether insurance was the only solution; he took the view that incorporating such a requirement into an international legal instrument would make the airline industry a captive market for insurers, and that guarantees might be more appropriate. It was agreed not to issue a recommendation at this point; however, the Group was of the opinion that the matter of adequate insurance cover and effective verification thereof deserved further study in the. work to be carried out.

ix) Article 29 of the Warsaw Convention

6.38 One Member of the Group submitted for consideration that Article 29 should be redrafted since this provision has been the subject of conflicting jurisprudence particularly, as to whether tolling of the two-year period was permitted, e.g. in case the plaintiff is an infant. Another Member supported this idea. The general belief among the Members of the Group was that this article, along with others, should be carefully re-examined when ICAO's work progressed further.

x) Position statement

6.39 One Member suggested that ICAO should pronounce itself on some of the principles agreed to by the carriers, as well as promote knowledge on certain aspects (e.g. level of increase of insurance costs) associated with the implementation of a modernized legal framework. To this effect, another Member suggested to consider the holding of regional workshops in which interested parties could be educated on the Warsaw System as a whole and the latest developments connected thereto. This would not only increase awareness of the participants but also promote informed discussion in the appropriate fora.

7. RECOMMENDED ACTION

7.1 After further discussion, including as regards the steps to be taken within ICAO to elaborate a new instrument, the Group adopted the recommendations reflected in paragraph 9 below.

8. ANY OTHER BUSINESS

8.1 There being no other business, the Moderator thanked the Members of the Group for their participation and contributions, indicating that it would depend on the decisions of the Council and the Secretary General whether further meetings of the Study Group were required. The Group thanked Dr. Weber for organizing and offering this forum and expressed its readiness to participate in any subsequent work, and the meeting was declared adjourned.

9. RECOMMENDATIONS OF THE STUDY GROUP

9.1 As a result of its discussions at the meeting of 12-13 February 1996 which took into account, as mandated by the Council, the results of the socio-economic analysis of the limits of liability under the Warsaw System undertaken by the Air Transport Bureau in conjunction with the International Air Transport Association (IATA), the comments thereon by the Air Transport Committee (ATC), and other related work undertaken by IATA, including the Intercarrier Agreement on Passenger Liability (Kuala Lumpur, 31 October 1995),

the Study Group recommends:

1. that action should be taken to develop a new international instrument to consolidate and modernize the Warsaw Convention System and bring it in line with present-day requirements;

2. that such new instrument should, in particular:

   a) provide for a two-tier liability regime for recoverable compensatory damages in case of injury or death of passengers, comprising:

      i) liability of the air carrier up to [100,000 SDR] irrespective of the carrier's fault;

      ii) liability of the air carrier in excess of [100,000 SDRJ on the basis of the carrier's negligence,

      the defence of contributory negligence of the passenger or claimant being available in both instances;

   b) revise the limit of liability for checked and unchecked baggage;

   c) modernize the provisions regarding the ticket and other documentary requirements;

d) include elements of the Warsaw Convention, the Hague, Guatemala City, and Montreal Protocols as well as the Guadalajara Convention, to the extent that they are appropriate, give effect to, and are consistent with the foregoing.

3. that such action be commenced without delay;

4. that a first draft for the new instrument be developed by the Legal Bureau, with the assistance of the Study Group; that a Rapporteur be appointed by the Chairman of the Legal Committee to review and revise the draft and present a report thereon;

5. that the draft instrument, together with the Rapporteur's report, be submitted to a Sub-Committee of the Legal Committee, which should be convened for this purpose as early as possible;

6. that as early as practicable thereafter, the matter be reported to the Legal Committee;

7. that upon approval of the draft instrument by the Legal Committee, the Council convene a Diplomatic Conference as soon as possible for the formal adoption of the instrument;

8. that the Council urge States which have not done so, to ratify Montreal Protocol No. 4, relating to cargo liability;

9. that the Secretary General be requested to take all necessary measures for the early implementation of this action plan.

ATTACHMENT A

ICAO STUDY GROUP ON THE WARSAW CONVENTION

Attendance

Mr. R. **Farhat**
Professor of Law, Solicitor
Former Director General of Civil Aviation
(Lebanon)

Mr. V. Poonoosamy
Director Legal and International Affairs
Air Mauritius
(Mauritius)

Mr. E.A. Frietsch
Counsellor
Federal Ministry of Justice
(Germany)

Mr. G.N. Tompkins, Jr.
Attorney at Law
Tompkins, **Harakas,** Elsasser **&** Tompkins
(United States)

Mr. G. **Lauzon,** Q.C.
General Counsel
Constitutional and International Law
Department of Justice
(Canada)

Mr. K.J.M. Walder
Legal Director
British Airways Plc
(United Kingdom)

Mr. A.G. **Mercer**
Company Solicitor
Air New Zealand Limited
(New Zealand)

Non-attending Member

Judge G. Guillaume *
International Court of Justice
(France)

* Judge G. Guillaume agreed to be a Member of the Group but was unable to attend the meeting.

ATTACHMENT B

LIST OF DOCUMENTS

1. Socio-economic analysis of air carrier liability limits (AT-WP/1769), dated 4 January 1996.

2. Socio-economic analysis of air carrier liability limits, 1) air carrier input on insurance cover and costs; and 2) IATA Intercarrier Agreement (AT-WP/1773), dated 27 December 1995.

3. ICAO State Letter EC 2/73-95/7 of 24 February 1995 and IATA questionnaires forming the basis of the above study.

4. Council decision 146/3 of 15 November 1995.

5. Report of the Working Group "II" on Intra-European Air Transport Policy (ECAC), dated 9 November 1995.

6. EU Commission Proposal for a Council Regulation on air carrier liability in cases of air accidents, dated 20 December 1995, including explanatory memorandum.

7. ICAO State Letter LE 3/27, 3/28-91/3, dated 16 January 1991.

8. Agreement Implementing the IATA Intercarrier Agreement, dated 1 February 1996.

ATTACHMENT C

AGENDA

1. Opening statement - Mandate and Working Methods of the Study Group

2. Approval of the agenda

3. Discussion of issues relevant to modernize the Warsaw System

   (a) Revision of passenger liability limits

   (b) Revision of liability regime (strict *vs* fault liability; breakable limits, etc.) (Art. 20, Art. 25)

   (c) Implications of current other initiatives, including the IATA Intercarrier Agreement

   (d) Possible revision of baggage and/or cargo liability limits

   (e) Other points which may be considered:

   - update mechanism
   - compulsory up-front payments
   - point of reference for revision (WC, HP, GCP, MAP3)

4. Recommended action (Recommendations to ICAO Council)

5. Any other business

- END -

Legal Advisory Group Subcommittee Meeting on Passenger Liability Montreal, 3 April 1996 Attendance List

	Airline	*Name*
1.	Air Canada	DesBois Cameron
2.	Air France	Folliot Michel
3.	Air Malta	Spiteri Christopher
4.	Avianca	Dueri Eduardo (also for *AITAL*)
5.	American Airlines	McNamara Anne
6.	American Airlines	Brashear Jim
7.	British Airways	Walder Ken
8.	British Airways	Jasinski Paul
9.	Canadian Airlines International	Fredeen Ken
10.	Cathay Pacific	Bass Philip
11.	Delta Airlines	Mayo Gerry
12.	Delta Airlines	Parkerson John
13.	Deutsche Lufthansa	Adenauer-Frowein Bettina
14.	Deutsche Lufthansa	Santangelo Anthony A.
15.	Deutsche Lufthansa	Müller-Rostin Wolf
16.	Egyptair	Hussein Sherif (for AACO also)
17.	Egyptair	Ahmed Hafez
18.	El Al Israel Airlines	Zussman Ephraim A.
19.	Japan Airlines	Miyoshi Susumu
20.	Japan Airlines	Tompkins George
21.	Kuwait Airways	Alhazaa Mona
22.	Kuwait Airways	Alroumi Rasha
23.	Royal Jordanian	Baq'ain Hani
24.	SAS	Westerstad Hans
25.	Swissair	Hodel Andres
26.	TACA/KAC	Whalen Thomas
27.	TAP - Air Portugal	José de Bettencourt Rodrigues

Legal Advisory Group Subcommittee Meeting on Passenger Liability
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Attendance List
Page 2 (Revised)

	Regional Association	*Name*
1.	AACO	**Sherif Hussein** (for Epyptair also)
2.	AEA	Frisque Marc
3.	AFRAA	Makonnen Aberra
4.	AITAL	Dueri Eduardo (for Avianca also)
5.	ATA	Warren Robert
6.	ATA Counsel	Dean Warren
7.	OAA	Trent Judith

	Governmental Body	*Name*
1.	European Commission	Colucci Anna

	IATA Secretariat	*Name*
1.	IATA Legal	Clark Lorne
2.	IATA Legal	Donald Rob
3.	IATA Washington	O'Connor David
4.	IATA Insurance	Kelly Tony
5.	IATA Washington Counsel	Rein Bert

COMMISSION ON AIR TRANSPORT

IATA/ICC WORKING PARTY ON AVIATION LIABILITY DISPUTE RESOLUTION

(Meeting on Friday I March 1996, ICC International Headquarters - Paris)

SUMMARY RECORD

The second meeting of the IATA/ICC Working Party on Aviation Liability Dispute Resolution was held on 1 March 1996.

The list of participants is attached as Annex 5.

1. Documentation

Meeting documentation included:

an ICC Secretariat discussion paper on "A Dispute Resolution Service (DRS) for Passenger Liability Claims Against Air Carriers on the Quantum of Damages" (Annex 1) and a written comment on this paper submitted by Air France (Annex 2)

an IATA information paper on "Typical Warsaw Cases in US Courts" (Annex 3)

the draft "Agreement Implementing the IATA Intercarrier Agreement" (Annex 4)

2. Action items

Participation in future meetings to be arranged with the insurance industry, possibly through the International Union of Aviation Insurers.

consumer representatives to be brought into the process as soon as a reasonably concrete framework for the envisaged rules had been devised.

The ICC to prepare, if possible, a first draft of the envisaged rules for the next Working Party meeting.

3. Relevant developments since the first meeting.

During a recent IATA Legal Advisory Subcommittee meeting in Miami on 31 January-1 February 1996, US carriers had expressed general support for the IIA. Formal support would, however, be subject to further discussions with the US DOT. At the same meeting, an "Agreement Implementing the IIA" had been adopted (with US carriers abstaining) in which i.a. the IIA "law of domicile" provision was explicitly confirmed as an option available to the carrier.

The IATA view that a "fifth jurisdiction" could only be achieved through amendment of the Warsaw Convention was explained. However, the introduction of a ***sui generis*** arbitration procedure, as considered by the Working Party, might eventually well be an acceptable alternative to fifth jurisdiction advocates.

European Commission officials had indicated a willingness to coordinate the implementation of the IL4 with proposed EC regulations, in order to promote global uniformity.

4. ICC Discussion Paper - "A Dispute Resolution Service (DRS) for PassengerLiability Claims Against Air Carriers on the Quantum of Damages"

Mr. Bourque (ICC) introduced his discussion paper outlining some of the main issues to be taken into account while drafting a specialised set of arbitration rules in this area.

(I. PRELIMINARY QUESTIONS)
(A. Public Policy)

Further study was required on the impact of section V2 (b) of the 1958 New York Convention on the recognition of foreign arbitral awards on the proposed IATA/ICC DRS, but the general consensus was that, under major legal systems, a claimant could waive his right to court proceedings and accept as binding the decision of an arbitral tribunal.

The question was raised whether an action on quantum would be contained in an action for damages under Art. 28 of the Warsaw Convention.

(B. Arbitrability of death or injury claims - consumer arbitration)

Further study was required on the extent to which the DRS would be able to arbitrate air carrier liability claims for injury or death. The domestic laws of some States might prohibit such arbitration. The availability of such arbitration would not prevent criminal proceedings from being instituted.

Before offering the DRS option, a study would have to be conducted to ensure that death and injury cases would be arbitrable in relevant jurisdictions.

It was agreed that the DRS's consumer-friendliness, which was one of the Working Party's primary objectives, should be enhanced by bringing consumer representatives into the process as soon as a reasonably concrete framework for the envisaged rules had been devised.

(II. **ARBITRATIONPROCEDURE**)
(A. Arbitration agreement)

The post-accident standard arbitration agreement would have to be more detailed than arbitration clauses and include more elements of the actual rules than was the case in commercial arbitration.

The agreement should use simple language, understandable to the ordinary claimant. Consideration should be given to translating it into several languages.

The general consensus was that claimants wishing to use the DRS should be required to sign an agreement, waiving their rights to court proceedings, and accepting the arbitral award as final and binding.

The Working Party discussed whether the option to use the DRS system should be available as an option both to the claimant and to the airline.

(B. ICC Rules or Specialised ICC DRS?)

Participants agreed with Mr. Schwartz that the current ICC rules of conciliation and arbitration would not be appropriate for the envisaged DRS system.

First and foremost, the DRS procedure should be as simple as possible. Also, the system should take into account the human aspects of this type of claims, allowing people to speak to the extent justifiable taking into account the fact that the carrier would have

accepted liability. This aspect might also have consequences for the required level of confidentiality.

It was decided that the ICC should prepare, if possible, a first draft of the envisaged rules for the next Working Party meeting.

(C. Main features of specialised arbitration rules)

(1. Scope)

Generally, the DRS would discuss quantum only. Parties could decide to discuss liability, but this may impact on the list of preselected arbitrators and give rise to other legal issues.

Participants agreed that it might be difficult to exclude access to the DRS system for less important cases (bump on the head, etc.), but that effective ways of doing so should be explored carefully.

It would be advisable to settle questions such as contributory negligence prior to recourse to the DRS.

In general, participants agreed that any party who could initiate a court case under Warsaw concerning death or injury claims should have the possibility to opt for the DRS.

In case of death, the airline would have to ensure that all possible claimants be encouraged to resort to the DRS procedure. Further study was required on the procedure to determine whether a claimant was a legitimate next of kin, etc. (legitimate claimant). This might impact on time limits for arbitrating cases.

(2. Administrative body)

In principle, it was considered that the ICC could administer the system. IATA advanced the concept of five regional panels or offices. Participants recognised the need for a centralised body to ensure coordination of the system. It was suggested that ICC National Committees could serve as national "mailboxes" (close to the "consumers").

Participants addressed the need for the ICC to allocate additional resources to administer the system.

It was proposed that the administrative body be given a neutral name and be separate from the ICC Court of Arbitration, as was the case with the Centre for Expertise.

Some form of supervisory body, or "steering committee", with representation from relevant interests, was deemed desirable. This could possibly be modelled on the current system of the ICC Centre for Expertise. A Steering Committee could consist of five permanent and five alternate members. Increased use of modem communications methods such as e-mail and videoconferencing should be explored to improve responsiveness. Steering Committee members would normally not be remunerated.

(3. Request and answer)

Participants agreed that standard forms for request and answer would be necessary to achieve efficiency.

(4. Constitution of arbitral tribunal)

(a. Number of arbitrators)

The number of arbitrators would have to be set at one or three, along the same lines as the current ICC rules of conciliation and arbitration. Three arbitrators would be more expensive but might be preferable from a consumer credibility point of view.

(b. Selection of arbitrators)

Mr. Schwartz explained that, for practical reasons, the current ICC system did not work with lists of arbitrators. Nevertheless, Mr. Clark said that a system of pre-existing regional lists was preferred by IATA as this would expedite the arbitration proceeding.

Participants discussed the possibility to create a system of regional lists withan escape-clause through which non-listed arbitrators could be nominated (for instance where a country or language was not represented).

(c. Independence)

Participants concurred that a declaration of the independence of arbitrators, as well as a procedure for challenging and replacing arbitrators would likely be necessary.

(5. Harmonisation/Consolidation)

Participants agreed that harmonisation and consolidation would be desirable. This would be difficult, despite the fact that, in principle, the sole issue in contention would be the quantum of damages.

(6. Proceedings)

(a. Place)

It was agreed that a wider choice than the four venues specified in the Warsaw Convention should be offered, subject to applicable law. The place of arbitration should be at the choice of the parties. Rigid rules should be avoided.

(b. Hearings)

Normally, hearings would be held, except when the parties agreed to have a procedure on documents only. However, it was agreed that terms of reference would probably not be necessary in this context.

The language of the procedure should be decided by the arbitrators in consultation with parties, taking into account all relevant circumstances. The language expertise of arbitrators needed to be indicated in the lists.

(7. Provisional measures)

The DRS rules should specify whether claimants would be entitled to a provisional award to take care of emergencies, and if so, up to what percentage of the claim. Arbitrators would take provisional awards into account when making the final award.

Participants agreed that the issue of upfront payments needed to be considered more closely, especially with regard to Art. 4 of the draft European Commission Proposal for a Council Regulation on Air Carrier Liability in case of Air Accidents and the 1995 ECAC proposal.

(8. Applicable law)

The applicable law should be decided on the basis of (1) the contract of carriage; (2) any other relevant agreement between the parties; and (3) the applicable law under the Warsaw Convention, while (4) taking into account all other relevant circumstances.

Applicability of the law of domicile needed further study. The complexity of this issue may require arbitrators familiar with choice of law problems.

(9. Time)

(a. Time-bar for filing)

No reference was contemplated in the envisaged DRS rules to the time-bar of the Warsaw Convention.

(b. Time-limits)

The rules should take into account the parties' desire for an expedited and streamlined arbitration proceeding.

It was proposed that a decision would be handed down in about 8 months, including 6 months from the request for arbitration to the last hearing and two months from the last hearing to issuance of an award. Possibilities for extension should be provided.

(10. Award)

The DRS rules should aim at a harmonisation of awards.

(11. Review procedure)

The DRS rules may have to contemplate a review procedure by which the same, or another, arbitral tribunal could allow further damages for additional claims arising especially from injury cases.

(12. Scrutiny of awards/ Appeals procedure)

Participants agreed that there was no need for a possibility for scrutiny of awards, nor for an appeal procedure.

It was suggested that these issues might be revisited in the light of experience after implementation of the DRS.

(13. Costs)

It was agreed that the envisaged system should constitute an attractive option to the claimants. At the same time, measures should be taken to avoid "free-rider" behaviour. This would be less of a concern if the option to arbitrate had to be jointly agreed by both the claimant and the airline.

A system could be devised under which the claimant would bear the cost if the arbitral decision awarded less than what the airline had offered in settlement.

In other cases, arbitrators could decide what proportion of costs of arbitration claimants should bear, e.g. if the claimant unnecessarily prolongs a case, he/she should bear a proportion of the costs.

Participants agreed that, in general, parties should pay their own legal representation costs. Arbitrators should receive a fixed amount plus a margin, to be decided by the Steering Committee.

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NEXTMEETING:

The next meeting is to take place after filing of the IIA and Implementation Agreement with governmental authorities. A tentative date was fixed for Wednesday, 15 May 1996 at 10:00 hours.